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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

DEMOCRATIC NATIONAL COMMITTEE, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Democratic National Committee hereby petitions for a writ of certiorari of the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment in *Democratic National Committee* v. *Federal Communications Commission,* No. 71-1637, which was decided on February 2, 1972, together with *Republican National Committee* v. *Federal Communications Commission,* No. 71-1723, in a single opinion.

OPINIONS BELOW

The court of appeals' opinion has not yet been officially reported and is reprinted as Appendix A to this petition. The opinion of the Federal Communications Commission, which was affirmed by the court of appeals, is reported at 31 F.C.C.2d 708 (1971) and is reprinted as Appendix C to this petition.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1972. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's application of the fairness doctrine to deny requests by petitioner to respond to three appearances by the President on the major television networks conflicts with the overriding First Amendment right of the public to be fully informed on all controversial issues that affect the conduct of government?

2. Whether in denying petitioner the right to respond to three appearances by the President on the major television networks the Commission construed the fairness doctrine in a manner that conflicts with the "public interest" standard of the Communications Act of 1934?

3. Whether the procedural burdens imposed on fairness doctrine complainants by the Commission deny fundamental fairness and are inadequate to safeguard the First Amendment interests at stake in such proceedings?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

The following provisions of the Communications Act of 1934 are pertinent to the issues in this case:

> *47 U.S.C.* § *307:* (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.
>
> * * *
>
> *47 U.S.C.* § *315:* (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast.
>
> (2) bona fide news interview.
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[1]

STATEMENT OF THE CASE

This case arises from the efforts of the Democratic National Committee (DNC) to have the Federal Communications Commission compel the three major television networks to provide DNC with time to respond to three separate television appearances by President Nixon in March and April, 1971. The Commission denied the relief sought, and the court of appeals affirmed the Commission's ruling.

A. The Presidential Broadcast Appearances at Issue

1. *"Today" Show Interview:* On March 15, 1971, President Nixon was interviewed by Barbara Walters on the National Broadcasting Company's (NBC) "Today" show. The interview consumed the entire program that morning, except for time devoted to commercials and regular news features. The interview focused

[1] Subsequent to the court of appeals' decision in this case, § 315 (a) of the Communications Act of 1934 was amended by Title I of the Federal Election Campaign Act of 1971, Act of Feb. 7, 1971, Pub. L. No. 92-225. The amendment added the words "under this subsection" to the third sentence of § 315(a). That amendment has no direct bearing on the issues in this case.

on the President's family life, the effect of his public career on his wife and family and to the role of his wife in his decisions as a public official. During the course of the interview, the President had an opportunity to express his views on a number of important and controversial public issues. DNC requested in a telegram to NBC that Democratic Party leaders be afforded similar exposure on the "Today" show because the President had discussed controversial issues of public importance and because the interview had afforded the President a rare opportunity to cast his image with the electorate in the best possible light. NBC denied the request.[2]

2. *March 22 Interview:* On March 22, 1971, the American Broadcasting Companies (ABC) presented a program entitled "A Conversation With the President" which was devoted exclusively to a one-hour interview of President Nixon by Howard K. Smith. The program was broadcast over ABC television and radio from 9:30 to 10:30 p.m., EST. The major portion of the interview related to an explanation of the President's policies in Vietnam. The President claimed success for his policies, blamed previous Democratic administrations for the conflict in Vietnam and rationalized his opposition for fixing a date certain for withdrawal of all American troops, a position that conflicted with that of the Democratic Party. The President also sought to justify his veto of an election reform bill that had widespread Democratic support and explained the rationale for his revenue-sharing proposals to Congress. ABC rejected DNC's request for time to respond to the interview.[3]

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[2] App. A, p. 4a.

[3] App. A, pp. 4a-5a.

3. *April 7 Indochina Address:* The three major networks—NBC, ABC and Columbia Broadcasting System (CBS)—gave President Nixon free time on April 7, 1971, to address the nation on his policies and programs in Indochina. The address was carried simultaneously on the three networks commencing at 9 p.m., EST. The address was a forceful defense of the President's Vietnam war policies. It was also highly partisan in tone. The President placed the blame for that tragic conflict on previous Democratic administrations and suggested that his predecessors had no program for ending the war. At the same time, he claimed unqualified success for his policies, including his Vietnamization program and the military invasions of Cambodia and Laos. The President also repeated his opposition to fixing a date certain for the withdrawal of all American troops from Indochina.[4]

DNC sent identical telegrams to the three networks requesting comparable time for the Democratic Party to respond to President Nixon's address. NBC and CBS denied the requests. ABC, however, agreed to provide one-half hour of prime time to permit spokesmen for the Democratic Party to discuss United States policy in Indochina and to explain the party's differences with the Nixon Administration on the issue of troop withdrawal. ABC fulfilled that commitment on April 22, 1971, when it presented a 30-minute program, entitled "Indochina: Another View," at 9 p.m., EST, on both television and radio. Six Democratic senators appeared on that program and stated their views on the Indochina conflict.[5]

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[4] App. A, p. 5a.

[5] ABC denied a request by the Republican National Committee (RNC) to respond to "Indochina: Another View." RNC sought relief in the Commission and the Commission denied RNC's com-

B. Proceedings in the Commission

On April 13 and 14, 1971, DNC filed four separate complaints with the Commission requesting that the Commission order (1) that NBC permit the Democratic Party to respond to the "Today" show interview and the April 7 Indochina address; (2) that ABC permit the Democratic Party to respond to the March 22 interview with Howard K. Smith; and (3) that CBS permit the Democratic Party to respond to the April 7 Indochina address. DNC asserted its right to the response time it sought under the Commission's fairness doctrine.

DNC made two separate and distinct fairness doctrine claims. First, DNC argued that the Commission should construe the fairness doctrine to impose upon broadcasters an obligation to afford time for those holding contrasting viewpoints to respond to each presidential broadcast appearance in which the President discusses controversial issues affecting the conduct of government. Second, DNC contended that the three presidential broadcast appearances at issue were partisan in nature and, for that reason, a response was required under the Commission's rulings in *Nicholas Zapple*, 23 F.C.C.2d 707 (1970), and *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971).

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plaint in the same ruling in which it denied the relief sought by DNC in this case. App. C. The court of appeals affirmed that phase of the Commission's ruling in the same opinion in which DNC was denied relief. *Republican National Committee* v. *F.C.C.*, No. 71-1723 (decided February 2, 1972). DNC does not contest the action of the Commission and the court of appeals in denying RNC time to respond to "Indochina: Another View."

In their responses to DNC's complaints, the three networks asserted that the fairness doctrine required only that they achieve balanced programming on the controversial issues discussed by the President. They alleged that they had achieved the requisite balance in their programming and that their refusal to afford response time to the Democratic Party was therefore justified. In support of their claims of balanced programming, CBS and ABC listed several programs on which persons opposing the President's Indochina policies had presented their views. NBC supplied no such supporting data.

DNC filed a reply to the networks' responses. Noting that the networks had presented the factual defense of compliance with the fairness doctrine, DNC requested that the Commission conduct an evidentiary hearing so that the networks' factual contentions could be tested through the adversary process. DNC contended that such a hearing was the only available method for testing the validity of the networks' factual defense of compliance with the fairness doctrine.

The Commission denied DNC the relief it sought in a Memorandum Opinion and Order dated August 20, 1971. See Appendix C. Commissioner Johnson dissented without opinion.

The Commission first ruled that it would be "wholly inappropriate" to extend its *Zapple* and *Republican National Committee* rulings to cover presidential broadcast appearances, although it conceded that in such appearances the President is "most often engaged in setting forth the wisdom of . . . particular actions."[6] For that reason, the Commission tested the networks'

[6] App. C, p. 51a.

obligations under general fairness doctrine principles, which the Commission enunciated as "whether on an overall basis the networks have afforded reasonable opportunity for discussion of contrasting viewpoints on [the] varied issues" touched upon by the President.[7] The Commission concluded that "in view of the overall programming of the three networks, it cannot be said that the 'sum total' of any of the networks' efforts failed to satisfy the requirements of the fairness doctrine."[8] The Commission also observed that, "in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views."[9] Despite its no-evidence ruling, the Commission refused to order the evidentiary hearing requested by DNC.[10]

C. The Court of Appeals Decision

The court of appeals unanimously affirmed the Commission's ruling. The court agreed with the Commission that DNC's complaints should be tested by general fairness doctrine principles and it concluded that DNC had failed to carry its burden of showing a lack of balance by the networks in their coverage of the controversial issues discussed by the President.

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[7] App. C, pp. 53a-54a.

[8] App. C, p. 54a.

[9] App. C, p. 54a.

[10] In the same opinion, the Commission denied RNC's complaint against ABC seeking time to respond to "Indochina: Another View." See note 5, *supra*. As part of its complaint, RNC requested that the Commission order ABC to make available logs and other documents showing that network's coverage of the Indochina issue from February 8, 1971, to April 8, 1971. The Commission also denied that request. App. C, p. 55a.

Two themes run through the court of appeals' opinion. First, the court expressed the fear that granting the right to respond sought by DNC would discourage presidential use of the broadcast media to communicate with the American people and, thus, "abridge the right of the public to be informed."[11] Second, the court viewed the central enforcement mechanism of the fairness doctrine as the broadcasters' "voluntary good-faith compliance" with the requirement of balanced programming,[12] and it ruled that there should be no intercession by the Commission or the courts unless complainants make "a clear showing of abuse of discretion."[13]

DNC argued that the objectives of the fairness doctrine could be achieved with respect to presidential broadcast appearances only if a right to respond to all such appearances was recognized. That argument was grounded in prior Commission rulings and in the First Amendment. DNC noted that, in other contexts when the right to respond normally afforded was found to be inadequate, the Commission had created "specific corollaries" to the fairness doctrine to permit an effective response.[14] DNC also contended that, unless a right to respond to presidential broadcast appearances was

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[11] App. A, p. 26a.

[12] App. A, p. 28a.

[13] App. A, p. 28a.

[14] *Republican National Committee*, 25 F.C.C.2d 739, 742 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting Co.* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971). The "corollaries" referred to are the political spokesman doctrine created in the *Zapple* ruling and the Commission's personal attack and political editorializing rules approved by this Court in *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969).

recognized, the President would dominate the discussion on the broadcast media of controversial issues affecting the conduct of government.[15] That consequence would diminish "the right of the public to receive suitable access to . . . political . . . ideas and experiences" which is the central First Amendment concern in broadcasting. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). The court of appeals rejected both of those arguments.

The court below also affirmed the Commission's refusal to conduct an evidentiary hearing[16] and to order ABC to produce its logs and other programming materials.[17] At the same time, however, the court of appeals expressed strong approval for the Commission's requirement that fairness doctrine complainants produce "specific and detailed evidence" of noncompliance with the fairness doctrine to have their complaints considered on the merits.[18]

REASONS FOR GRANTING THE WRIT

1. The Court has agreed to hear several cases involving the First Amendment obligations of broadcasters similar to the First Amendment issue presented by this case. *Columbia Broadcasting System* v. *Democratic*

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[15] See *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

[16] App. A, pp. 38a-40a.

[17] App. A, pp. 29a-33a. The request for that material had been made by RNC, see note 10, *supra*, but DNC argued in the court of appeals that aspect of the Commission's ruling with respect to RNC's complaint was erroneous. DNC intervened in the RNC phase of the case in the court of appeals.

[18] App. A, pp. 29a-33a, 37a-38a. That procedural requirement finds expression in *Allen C. Phelps*, 21 F.C.C.2d 12 (1969), a ruling that the court below cited with approval.

National Committee, Nos. 71-863, *et al.,* 40 U.S.L.W. 3410 (Feb. 29, 1972). The issue in those cases is whether broadcasters can, consistent with the First Amendment, impose a flat ban on the sale of time to responsible individuals and groups for the discussion of public issues. The Commission endorsed that flat ban but the court of appeals reversed, holding that such a flat ban was in conflict with the First Amendment.

The issues in this case, while not identical to those in *Columbia Broadcasting System, et al.,* are sufficiently similar to warrant review by this Court. The central issue in *Columbia Broadcasting System, et al.,* is whether broadcasters can, consistent with the First Amendment, foreclose access to the broadcast media by those who wish to express their views on issues of public importance and who are willing to pay for the broadcast time they seek. The central issue in this case is whether a broadcaster who affords the President free time to present his views on controversial issues affecting the conduct of government can refuse to afford those holding significant contrasting viewpoints the same opportunity to present their views. As petitioner will show below, that issue raises serious First Amendment questions.

By agreeing to hear *Columbia Broadcasting System, et al.,* the Court has indicated it intends to continue its examination of the First Amendment obligations imposed on broadcasters, an examination begun three years ago in *Red Lion Broadcasting Co.* v. *F.C.C.,* 395 U.S. 367 (1969). That inquiry will be aided if the Court grants this petition and examines the related First Amendment issues in this case.

2. The central constitutional concern in the area of broadcasting is "the First Amendment goal of produc-

ing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *F.C.C., supra,* 395 U.S. at 392. Because of the limited number of broadcasting licenses available, the essential rights at stake are defined by reference to that goal.

> "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial." 395 U.S. at 390.

The decision by the court below in this case threatens those First Amendment rights.

The President of the United States occupies the most powerful office in the free world. By virtue of his constitutional powers and responsibilities and his status as the only public official elected by a nationwide constituency, he wields tremendous influence and power in shaping public opinion. It is, in the words of Clinton Rossiter, a "unique power to compel discussion in his own terms."[19] That power is magnified immeasurably when it is exercised through appearances on television —the most effective medium of communication ever devised by man.

The First Amendment goal of producing an informed public will be frustrated if broadcasters continue to provide the President with free broadcast time at his request while denying those opposing the President's views any effective right to respond. But broad-

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[19] C. Rossiter, *The American Presidency* 31 (Mentor, rev. ed. 1962).

casters have consistently followed that practice in the past, and the decision by the court below permits them to continue doing so. The dangers of such a practice were succinctly stated by the court of appeals in another decision:

> "[I]f the words and views of the President become a monolithic force, if they constitute not just the most powerful voice in the land but the only voice, then the delicate mechanism through which an enlightened public opinion is distilled, far from being strengthened, is thrown dangerously off balance. Public opinion becomes not informed and enlightened, but instructed and dominated." *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

The President's unfettered access to television and its mass audiences to seek support for his programs and policies, combined with the inability of those opposing his programs and policies to obtain access to the same audiences, permits the President to dominate the discussion of controversial issues affecting the conduct of government. Such a consequence is in direct conflict with the constitutional policies defined by this Court in the *Red Lion* decision. But that is the necessary consequence of the court of appeals decision in this case.

The court below was apparently unable to perceive these ramifications of its decision. It agreed with petitioner that the First Amendment seeks to preserve broadcasting as an open forum for the robust and uninhibited discussion of public issues.[20] See *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). But it apparently feared that public discussion would be in-

[20] App. A, pp. 35a-36a.

hibited if a response to presidential broadcast appearances were permitted because the President would restrict his use of television. That unsubstantiated fear cannot justify abridgment of First Amendment rights. It is a negation of First Amendment values to permit broadcasters to use their power to insulate the President from criticism.

The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times* v. *Sullivan, supra,* 376 U.S. at 270. When issues affecting the conduct of government hang in the balance, the First Amendment does more than simply protect the right to speak; it preserves the very processes by which we have chosen to govern ourselves. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964).

The decision below means that only the President's voice and views will be heard clearly on critical issues. The public will be denied the exposure to competing viewpoints that is essential to an informed electorate. As a result, the public will be unable to exercise intelligently "the most effective check on the President: the opinions of the people of the United States." [21] As long as the broadcast media is the principal channel for communicating information and viewpoints on public issues, the First Amendment requires that it remain forum for open and robust discussion. The decision by the court below in this case is contrary to that constitutional command.

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[21] C. Rossiter, *supra* note 19, at 65.

3. Review by this Court is also warranted because the court below and the Commission have construed and applied the fairness doctrine in a manner that will defeat the doctrine's goal of assuring that listeners and viewers will be adequately exposed to contrasting viewpoints on controversial issues of public importance.

The court below was content to confine its fairness doctrine analysis to a recitation of general fairness doctrine principles.[22] The keystone of those principles is that a broadcaster, in his total public issue programming, must provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. See, *e.g., Committee for the Fair Broadcasting of Controversial Issues,* 25 F.C.C.2d 283, 295 (1970). The broadcaster is permitted to satisfy that obligation in a variety of formats—on news shows or news interview programs or through the broadcaster's own comments or analysis. *Id.* at 295.

Petitioner does not quarrel with those principles as abstract propositions. But neither the court below nor the Commission were dealing with an abstract proposition in this case. The central question in this case is whether the general fairness doctrine principles relied upon by the court below and the Commission provide an adequate opportunity to present viewpoints contrasting with those advocated by the President in his broadcast appearances. The court below and the Commission failed to confront that critical issue because both chose to ignore the dynamic consequences of presidential use of television.

The drama of the televised presidential address and the audience it reaches permits the President to obtain

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[22] App. A, pp. 15a-22a.

instant consensus on his programs and policies. Reactions form before there is time for critical examination and evaluation. There is seldom a single focal point of opposition, and opponents must compete with the President's supporters for media attention in the period following a presidential address. Finally, the opposition has no access to the audience that the President addresses.

As construed and applied by the court below and the Commission, the fairness doctrine permits a broadcaster to limit the presentation of contrasting viewpoints to brief film clips on news programs, to responses to questions on news interview shows or to the broadcaster's own editorial comments. The President faces no such impediments when he obtains television time to address the nation. He has total control over the timing, format and content of the views he expresses on controversial issues. Denying those holding contrasting viewpoints similar opportunities falls far short of the goal of fairness in public issue programming.

In other contexts, when the Commission has recognized that the methods by which a broadcaster can satisfy his fairness doctrine obligations are inadequate, it has not hesitated to carve exceptions from that doctrine and create new rights to respond. For example, the Commission has imposed strict requirements on broadcasters to provide response time under its rules relating to personal attacks and political editorializing,[23] and this Court ruled in the *Red Lion* decision that those rules were consistent with the First Amendment. Similarly, the Commission has created the political spokesman doctrine which requires that, when spokes-

[23] 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679.

men for a major political party are given broadcast time to use as they see fit, spokesmen for the opposing party must be given comparable time.[24] The Commission has described each of those rules as a "corollary" to the fairness doctrine,[25] thus acknowledging that they impose obligations on broadcasters not required by general fairness doctrine principles.

Petitioner has asked the Commission in this case to do nothing more than it had already done with respect to the personal attack, political editorializing and political spokesmen corollaries, each of which represents an effort by the Commission to adjust the imprecise and, at times, ineffective commands of the fairness doctrine to the immense impact that the broadcast media can have in certain contexts. Such a rule is essential in this case if there is to be an effective opportunity to present views contrasting to those espoused by the President in his broadcast appearances.

The court below refused to come to grips with this central argument made by petitioner. The court, for example, observed that it was not its function to "give birth to a new corollary" to the fairness doctrine.[26] But petitioner made no such request of the court. It simply asked the court to rule that, in light of the corollaries already appended to the fairness doctrine, the Commission acted arbitrarily and contrary to the "public interest" standard of the Communications Act in refusing to recognize a right to respond to presidential broadcast appearances.

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[24] *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018 (D.C. Cir. 1971).

[25] *Id.*, 25 F.C.C.2d at 742.

[26] App. A, p. 41a.

At root, the court below was reluctant to disturb the unchecked discretion that broadcasters now enjoy under the fairness doctrine to deny a forum to those who oppose the views espoused in presidential broadcast appearances and who wish to express their viewpoints to the same audience that the President addresses.[27] But that discretion should not be permitted to abridge the right of viewers and listeners to be fully exposed to contrasting viewpoints on issues affecting the conduct of government. Indeed, "[t]his *carte blanche* licensee discretion has . . . been circumscribed . . . where it has been felt that an 'equal opportunities' approach might better serve the ends of fairness." *Columbia Broadcasting System* v. *F.C.C.*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

Abstract fairness doctrine principles must yield when the failure to do so will defeat the goal of fairness that is implicit in the "public interest" standard of the Communications Act. The refusal of the court below to recognize and apply that fundamental precept warrants review by this Court. Otherwise, the policies that underlie the fairness doctrine and that were endorsed by this Court in the *Red Lion* decision will be subverted.

4. The court below approved two procedural barriers imposed on fairness doctrine complainants which in combination deny them any semblance of procedural fairness. First, the court accepted as reasonable the Commission's requirement that fairness doctrine complainants produce "detailed and specific evidence of failure to comply with the requirements" of the fairness doctrine before their complaints will be considered

[27] App. A, p. 28a.

on the merits.[28] *Allen C. Phelps,* 21 F.C.C.2d 12, 13 (1969). Second, the court affirmed the Commission's refusal to order a broadcaster to make available his logs and other programming materials for a determination of whether he had achieved the requisite balance in his public issue programming.[29]

Thus, on the one hand, a fairness doctrine complainant is told that he must come forward with "detailed and specific evidence" of noncompliance with the fairness doctrine. On the other hand, he is denied all access to a broadcaster's programming materials, the only available source of "specific and detailed evidence" of a broadcaster's coverage of controversial issues of public importance. In effect, the only person with the necessary knowledge of a broadcaster's fairness doctrine performance—the broadcaster himself—is insulated from any requirement of coming forward with the information the Commission needs to resolve the merits of a fairness doctrine complaint.[30]

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[28] App. A, pp. 29a-33a, 37a-38a.

[29] App. A, pp. 29a-33a. The request for program logs and other documents was made by RNC. However, DNC challenged the denial of access to those materials when it intervened in the RNC phase of the case in the court of appeals. See note 17, *supra.* In addition, DNC's request for an evidentiary hearing was based in part on the fact that such a hearing would provide a mechanism by which DNC could obtain access to such materials.

[30] The court below suggested that, since networks—as distinguished from licensees—are not required to maintain program logs, there is no basis for requiring them to produce such materials. App. A, p. 31a. But, because the networks regularly list prior programming in defending against fairness doctrine complaints, it is clear they do maintain programming materials. CBS and ABC in this case listed some programs that presented viewpoints contrasting with those of the President. The difficulty is that the networks invariably list only programming favorable to their position and do not provide adequate information to determine whether their total programming on a particular issue was balanced.

In this case, DNC sought to avoid those consequences by requesting an evidentiary hearing. But that request was denied by the Commission and the court below affirmed that action by the Commission.

The only practical alternative available to a complainant is to monitor the programming of the three major networks on a continuing basis. But no individual or group in society has the resources necessary to undertake such monitoring. Not even the Commission has such resources. See *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1005 (D.C. Cir. 1966); *Californians Against the Tax Trap Initiative*, 19 F.C.C.2d 507, 509-10 (1969) (dissenting opinion of Commissioner Johnson).

The effect of the procedural rulings by the court below will be to discourage complaints by those who have been denied an opportunity to present their views on controversial issues of public importance—complaints that have become the most important adjunct to the machinery for enforcement of fairness doctrine obligations. The Commission has a special obligation to assure that public participation in proceedings designed to assure compliance with the "public interest" standards of the Communications Act is not frustrated by technical procedural barriers. *Office of Communication of the United Church of Christ* v. *F.C.C.*, 425 F.2d 543 (D.C. Cir. 1969); see *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 430 (8th Cir. 1970). The procedural rulings by the court below will have an unhealthy chilling effect on such public participation in enforcement of the fairness doctrine.

Moreover, this Court's *Red Lion* decision makes clear that the fairness doctrine is affected with First

Amendment interests. This Court has long recognized that, when the burden of proof is at issue in a proceeding affecting First Amendment rights, the allocation of that burden is of constitutional concern.

> "[T]he procedures by which the facts of the case are determined assume importance as fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *Speiser* v. *Randall*, 357 U.S. 513, 520-21 (1957).

Petitioner's claims in this case were grounded in the First Amendment, and the Commission applied its procedural rules to block adequate consideration of those claims. DNC was denied relief, in part, because "there is *no evidence* that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views."[31] If there was a lack of evidence, it was because the Commission's procedural requirements prevented its development.

The Commission shows no inclination to dismantle the procedural barriers it has erected in the path of fairness doctrine complainants. Review by this Court is essential to assure that such complainants will be afforded the procedural fairness to which they are entitled.

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[31] App. C, p. 54a. (Emphasis added.)

CONCLUSION

For these several reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH A. CALIFANO, JR.
CHARLES H. WILSON, JR.
1000 Hill Building
Washington, D.C. 20006
Attorneys for Petitioner

Of Counsel:

WILLIAMS, CONNOLLY & CALIFANO
1000 Hill Building
Washington, D.C. 20006

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1637

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC., COLUMBIA BROADCASTING SYSTEM, INC., REPUBLICAN NATIONAL COMMITTEE, NATIONAL BROADCASTING COMPANY, INTERVENORS

No. 71-1723

REPUBLICAN NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

DEMOCRATIC NATIONAL COMMITTEE, AMERICAN BROADCASTING COMPANIES, OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, NATIONAL BROADCASTING COMPANY, INTERVENORS

Petitions for Review of Order of the Federal Communications Commission

Decided February 2, 1972

Mr. Joseph A. Califano, Jr., with whom *Mr. Charles H. Wilson, Jr.*, was on the brief, for petitioner in No. 71-1637 and intervenor Democratic National Committee in No. 71-1723.

Mr. James J. Freeman, with whom *Mr. W. Theodore Pierson* was on the brief, for petitioner in No. 71-1723 and intervenor Republican National Committee in No. 71-1637.

Mr. Joseph A. Marino, Counsel, Federal Communications Commission, with whom *Messrs. Richard E. Wiley*, General Counsel at the time the brief was filed and *Charles A. Zielinski*, Counsel, Federal Communications Commission, were on the brief, for respondents.

Mr. Vernon L. Wilkinson, with whom *Messrs. James A. McKenna, Jr., Carl R. Ramey* and *Edward P. Taptich* were on the brief, for intervenor American Broadcasting Companies, Inc.

Mr. Timothy B. Dyk, with whom *Mr. J. Roger Wollenberg* was on the brief, for intervenor Columbia Broadcasting System, Inc.

Messrs. Lawrence J. McKay, Donald J. Mulvihill and *Howard Monderer* were on the brief for intervenor National Broadcasting Company, Inc.

Mr. Earle K. Moore was on the brief for intervenor Office of Communication of the United Church of Christ in No. 71-1723.

Mr. Lee A. Rau, Attorney, Department of Justice, entered an appearance for respondent United States of America in No. 71-1637.

Mr. Howard E. Shapiro, Attorney, Department of Justice, entered an appearance for respondent United States of America in No. 71-1723.

Before TAMM and MACKINNON, *Circuit Judges,* and A. SHERMAN CHRISTENSEN,* *U.S. District Judge* for the District of Utah.

TAMM, *Circuit Judge:* In these consolidated appeals we are once again asked to review a decision of the Federal Communications Commission (hereinafter either "FCC" or "the Commission") which was issued under the Commission's fairness doctrine. The two petitioners are the Democratic National Committee (hereinafter "DNC") and the Republican National Committee (hereinafter "RNC"). The three major networks, American Broadcasting Companies (ABC), Columbia Broadcasting System, Inc. (CBS), and the National Broadcasting Company (NBC), have all intervened in these actions and have filed briefs with the court, as has the Office of Communication of the United Church of Christ. While the issues in both actions revolve around the fairness doctrine, they do not raise precisely the same questions of law or involve the same facts. Therefore, it will be necessary for us to examine the facts and contentions of each of the petitioners separately.

I. The Facts

A. *Democratic National Committee v. Federal Communications Commission,* No. 71-1637

DNC placed three questions before us in its pleadings. They are:

(1) Did the FCC construe the fairness doctrine so as to deny DNC an opportunity to respond to three presidential network appearances thereby constituting an arbitrary act contrary to the "public interest" standard of the Communications Act of 1934?

(2) Did the FCC's application of the fairness doctrine conflict with the paramount first amendment

* Sitting by designation pursuant to 28 U.S.C. § 292(c) (1964).

right of the public to be informed on the controversial issues of the day which affect the conduct of our government?

(3) Were the FCC's procedures in this case adequate to safeguard the first amendment interests relating to the fairness doctrine which were involved in this litigation?

DNC now requests us to review the Memorandum Opinion and Order of the Commission, 22 P. & F. Radio Reg. 2d 727 (1971), which denied a request by DNC to compel the three major networks to provide time for DNC to respond to three separate appearances made by the President of the United States on radio and television.

The first of the appearances to which DNC seeks the right to respond was a March 15, 1971 telecast of the "Today" show broadcast over the NBC Television Network. During the two hour show there was a 48 minute interview of the President by Barbara Walters, one of the show's regular staff. This interview centered on the President's family life, the effect of his public career on his wife and family, and the role of his wife in his decisions as a public official. The President also gave his opinion as to "many of the important issues of the day." (J.A. 1.) NBC refused a request by Lawrence F. O'Brien, Chairman of the DNC, for exposure on "Today" similar to that afforded the President.

The second broadcast to which DNC sought to reply was entitled "A Conversation With the President" appearing March 22, 1971 on ABC. The program was a one-hour interview by Howard K. Smith. This program was broadcast simultaneously over both ABC radio and television. A major portion of this interview related to an explanation of the President's program and policies in Vietnam. He espoused the virtues of his Vietnamization program and of his policy of not announcing a date certain for

total withdrawal of all American forces in Southeast Asia. The President also spoke about his veto of the election reform bill during the last session of Congress which had the wide-spread support of the Democratic Party. In addition he explained the rationale for his proposed revenue-sharing proposals to the Congress. ABC rejected DNC's request for time to respond to the interview.

The last of the programs here in question involved a Presidential address to the nation on April 7, 1971, on all three major networks, on both radio and television. The broadcast involved the Administration's programs and policies in Southeast Asia. DNC contends that

> [t]he address was a forceful defense of the President's Vietnam war policies. It was also highly partisan in tone and content. The President unambiguously placed the blame for that tragic conflict on previous Democratic administrations and strongly suggested that his predecessors had no program to bring that war to an end. (A. 80) At the same time, he claimed unqualified success for his policies, including his Vietnamization program and the military invasions of Cambodia and Laos. (A. 80-82.)

(DNC Br. at 5.) Once again, the President explained his opposition to establishing a fixed date for withdrawal of all of our troops from Vietnam. The views expressed by the President in this area were in direct conflict with those of the Senate and House Democratic Caucuses and of the DNC Policy Council. DNC sent telegrams to each of the networks requesting an opportunity to respond. This request was denied by NBC and CBS. ABC agreed to grant the Democratic Party one-half hour of prime-time to permit a spokesman to speak about the American policy in Vietnam and explain the differences between the Administration's policy and that of the Democratic Party. On April 22, 1971, ABC broadcast "Indochina: Another View" on both ABC radio and television.

Alleging violations of the fairness doctrine, DNC filed four complaints with the FCC requesting that the networks be directed to provide time to DNC to respond to the above described Presidential appearances. Specifically they requested the Commission to order responses to (1) the March 15 interview on "Today" and the April 7 Indochina address on NBC; (2) the March 22 Howard K. Smith interview on ABC; and (3) the April 7 CBS presentation of the Indochina address.

The gravamen of the DNC complaint was

> that the three television appearances at issue were part of a deliberate presidential television blitz designed to provide increased exposure for President Nixon's positions on controversial issues and to improve his image with the electorate at a time when the 1972 presidential campaign was underway. Unless response time were afforded to the Democratic Party, the complaints stated, the President would have a virtual monopoly over access to the most powerful and influential of all communications media.

(DNC Br. at 7.)

Two of the complaints, one regarding the Howard K. Smith interview and the second being the Indochina address, were based on traditional fairness doctrine principles. DNC contends that those appearances were of a partisan nature requiring rebuttal by the opposition party. As to the "Today" show broadcast, it was DNC's position that the sole purpose of the show was to improve the President's image with the voting public. This, they assert, was a purely political appearance which gave rise to an "equal opportunity" situation under § 315 of the Communications Act of 1934.

In their answers to DNC's complaint, the three networks alleged that the fairness doctrine only required that there be a reasonable opportunity for discussion of conflicting

views with regard to issues of public importance. It was the networks' contention that they had each achieved the required balanced broadcasting of each of the issues discussed by President Nixon in the three appearances in question and that refusal of DNC's request for time to respond was therefore justified. To support these contentions both ABC and CBS submitted detailed data on programs on which parties opposed to the Administration's war policy had appeared. NBC did not submit any such data but did allege achievement of the required programming balance. DNC then requested the FCC to hold an evidentiary hearing in order to test the presentations of the networks' by way of the adversary process.

DNC wrote to FCC Chairman Burch more than three months after filing its complaint to protest the Commission's delay in ruling on the DNC complaints. Two weeks later, still having no indication of action by the Commission, this suit was filed. However, on August 20, 1971, the Commission issued its Memorandum Opinion and Order, 22 P. & F. Radio Reg.2d 727 (1971), denying DNC the relief sought. We shall consider the Commission's ruling *infra*.

B. *Republican National Committee v. Federal Communications Commission*, No. 71-1723.

RNC also seeks review of the Commission's Memorandum Opinion and Order, FCC 71-882, of August 20, 1971, 22 P. & F. Radio Reg.2d 727 (1971), which denied RNC's claim that ABC had violated the fairness doctrine. In seeking this review RNC raises two distinct questions which were not raised by DNC. Initially, RNC claims that it was error for ABC to fail to consider its non-news programs in determining whether fairness had been achieved in its coverage of the war in Indochina. Secondly, RNC asserts that it was error for the Commission to fail to meaningfully articulate disposition of RNC's complaint that ABC failed to consider a meaningful viewpoint in

its coverage of the Vietnam war, *i.e.*, the position of the Republican Party.

RNC requested that ABC grant it time to respond to Chairman O'Brien's broadcast which was in response to the President's radio and television broadcast of April 7, 1971. In its response to O'Brien's request ABC maintained that its "overall coverage of the Indochina issue ha[d] been fair and balanced, complying fully with requirements of the FCC Fairness Doctrine," (J.A. 86) nevertheless, ABC granted DNC a half-hour of prime-time in order to present the views of the Democratic Party after determining that "in view of the importance to the nation of the Indochina issue, additional coverage at this time would serve the public interest." *Id.*

RNC was particularly concerned that ABC's grant of time to DNC would serve only to polarize the war issue along partisan lines. They took this position based on ABC's statement that prior coverage had been fair and balanced. It was RNC's feeling that once these partisan presentations were begun that RNC should be given an opportunity to present the views of the Republican Party *qua* political party. In responding to RNC, ABC made it clear that they were not of the belief that DNC was automatically entitled to, or granted, a right to respond to the President's appearance. ABC asserted that its decision was made only after an analysis had been made by its News Department of all previous coverage of this topic by the network. Based on this analysis ABC deemed it necessary to give additional time to DNC.

In a letter sent to Senator Robert Dole, Chairman of RNC, Leonard H. Goldenson, president of ABC wrote that:

> [ABC is] denying the request of both the Republican and Democratic National Committees for detailed reports and logs of our coverage of the issue under discussion. As we previously indicated, our News Department carefully analyzed all the material relating to this coverage and concluded in good faith,

and based upon their professional judgment, that opportunity should be given Democratic spokesmen to express their opinions on a limited issue. The Fairness Doctrine requires us as responsible broadcasters to exercise that good faith judgment on programs, formats and spokesmen for presentation of contrasting views, and that we have done. We do not believe that those who disagree with that judgment have a blanket right of access to ABC News' coverage logs and we do not intend to initiate such a practice.

(J.A. 92-93.) Goldenson's letter continued by stating that

[W]e are convinced that our News Department exercised good faith and made a careful and thorough analysis of all the coverage previously given the issue over ABC's Television Network and concluded that, on an overall basis, the opportunity for the time we have allotted should be given to spokesmen for the DNC. We reiterate the good faith of that examination and we support the judgment of ABC News.

(J.A. 94.)

The DNC broadcast actually took place on April 22, 1971. Six senators, all serious contenders for their party's nomination and Chairman O'Brien, appeared to discuss the issue of the war. In his closing remarks O'Brien characterized the views expressed by each of the six as the views of the Democratic Party. After this broadcast RNC renewed its request lodged with ABC to represent the views of the Republican Party. RNC made its request contending that ABC had transformed the issue into a " 'DNC v. RNC' issue." (J.A. 107). In its final argument in this request, RNC inquired as to whether in making its determination of fairness of coverage of the war, ABC included time given to Administration opponents on non-News Department shows, *e.g.*, the Dick Cavett Show, and if not, why these programs were excluded. ABC refused

this request as well and contended that the network had presented "virtually every significant viewpoint on this highly controversial issue." (J.A. 109.) RNC then sought review of ABC's refusal by the Commission asserting that ABC's ruling was unreasonable. RNC made it clear from the outset that its claim was based on traditional fairness doctrine standards and noted that it was not seeking time to reply to DNC under the political spokesman doctrine. Again RNC raised the issue of appearances on non-news shows by those opposed to the Administration's Indochina policy. Since ABC failed to respond to RNC's earlier inquiry RNC urged the Commission to compel ABC to provide "any logs and other documents which would show the time used on ABC during the period February 8 to April 8, 1971, for the discussion of various viewpoints on the Indochina issue." (J.A. 79.) RNC contends that this information would have made it possible to discern whether ABC had erred in failing to consider its non-news coverage.

> In its opinion in this case, the Commission considered not only RNC's request for a ruling but also the complaints of DNC against the three networks. While RNC in its complaint had expressly stated that "[we] wish to make clear that we are *not* invoking any right of *access* by particular *speakers* to television, such as is involved in . . . the political spokesman doctrine" the Commission in its decision, nevertheless stated that RNC "sought to apply *Zapple*,[1] *Committee for Fair Broadcasting*[2] and *Republican National Committee*[3] to the April 22 broadcast of Democratic

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[1] Letter to Nicholas Zapple, 23 F.C.C.2d 707 (1970).

[2] Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970).

[3] Republican National Committee, 25 F.C.C.2d 739 (1970), *reversed sub nom. C.B.S.* v. *F.C.C.*, No. 24,655 (D.C. Cir. November 15, 1971).

spokesmen on ABC. . . . " FCC 71-882 at 7. (A. 136.) The Commission then held that these decisions, which formulated and applied the political spokesman corollary to the Fairness Doctrine, were inapplicable in the instant case because ABC had exercised journalistic supervision over the DNC broadcast in contrast to the situation presented in *Republican National Committee.*

(RNC Br. at 7, emphasis in original, footnotes renumbered.)

In its evaluation of ABC's coverage of the war issue the FCC stated that the fairness doctrine does not require precisely equal time for contrasting viewpoints and concluded that ABC was acting within its sound discretion in granting time to DNC although ABC itself stated that prior to granting time to DNC its coverage had been fair and balanced. The Commission did not reach the issue of whether ABC neglected a significant viewpoint, *i.e.*, the viewpoint of the Republican Party *qua* party.

In addition the FCC refused to require ABC to produce logs, documents or other records. It was the Commission's finding that RNC "offered no evidence that ABC failed to present contrasting views in other programs" and that "it would be unreasonable to require licensees to disprove allegations which lack specific and detailed evidence of failure to comply with the fairness doctrine." (J.A. 138.) The Commission made no finding as to whether ABC had considered non-news programming in making its evaluation.

C. *Decision of the Commission*

The Commisison began by undertaking consideration of application of the political party doctrine contained in *Zapple, supra,* and *Republican National Committee, supra,* to the facts in the cases at bar. As the Commission noted those cases established the proposition that when one political party or group is given time on the media to use

at its discretion a request by an opposing party for time cannot be refused. The Commission explained that air time given to the President, at a time when he is not a candidate for re-election is not subject to the "political party" doctrine. *Republican National Committee, supra*, 25 F.C.C. 2d at 744. We believe that the first paragraph of discussion in the Commission's decision bears reprinting in full.

> We shall first deal with the argument that the President's appearances fell within the holdings of *Zapple* and *Republican National Committee* on the grounds that they were partisan in nature. The Commission specifically stated in *Republican National Committee*, at 744, that "Presidential appearances (other than as a candidate for re-election, when of course 'equal opportunities' would be applicable . . .) do not come within the 'political party' [*Zapple*] doctrine." Thus, we do not feel that the *Zapple* ruling or its application in *Republican National Committee* should be applied to any of the Presidential appearances that are the subjects of the complaints before us. We feel that to extend *Zapple* or *Republican National Committee* to Presidential appearances would be wholly inappropriate. Presidents and other public officials (*e.g.*, Governors, mayors) do report to the public, and such reports, as we have said, contribute to an informed citizenry. Of course, the officials in such reports are most often engaged in setting forth the wisdom of the particular actions on which the reports are given. But this does not mean that this is a political party appearance to which given equal opportunities "is applicable." If that were so, the Commission would have, in effect, amended the Communications Act to specify that equal opportunities applies to all appearances of public officials. The Act, we believe, makes clear that it is fairness—not equal opportunities—which should govern here; and

> in any event, we believe it sound policy, for the reasons set forth in the *Fair Committee* ruling, that this situation—appearances of public officials during non-election periods—should come under the fairness doctrine with respect to controversial issues covered. The *Zapple* ruling thus remains applicable to time given to the political parties for their use as they see fit. *Republican National Committee, supra.*

(J.A. 135-36, emphasis in original, footnote omitted.) The Commission noted that by the terms of its earlier opinion in *Committee for Fair Broadcasting, supra,* RNC's request for equal treatment by ABC was beyond the requirements of the law.[4] The Commission distinguished the two cases on the fact that here ABC had exercised firm control in assuring that DNC's response would be directly to the President's appearances and that time would not be provided for the use of a political party *qua* party. "[T]he licensee [had] exercis[ed] its discretion under the fairness doctrine to choose appropriate spokesmen to discuss contrasting views on controversial issues of public importance." (J.A. 136.) By the same token, it would be a discretionary matter for ABC to decide if it should select or reject RNC as an appropriate spokesman on a controversial issue.

The Commission then turned to a consideration of whether the general principles of the fairness doctrine had been complied with in this case. It concluded, after considering the programming of the channels in view of the DNC and RNC complaints, that there had been an adequate opportunity for a full and reasonable discussion of contrasting viewpoints of controversial issues.

In dealing with RNC's contention that it failed to receive equitable treatment from the networks, under the dictates of the fairness doctrine, the Commission made it

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[4] *See* Ruling (E). Committee for Fair Broadcatsing, *supra*, at 299-301.

clear that "precisely 'equal time' [was not required]." (J.A. 138.) The Commission stated:

> We should add that, in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views. We do not accept the RNC position that because ABC thought its overall programming was "fair and balanced" before it granted the DNC request for time to respond to the President's April 7 address, it could not be balanced after the request was granted. The fairness doctrine does not require that precisely "equal time" be given to contrasting views (*Committee for Fair Broadcasting, supra,* at p. 297); only that reasonable opportunity be afforded for their presentation in the licensee's overall programming. Under the doctrine, the licensee also is given great discretion in meeting its obligations. (*Fairness Primer,* 40 FCC 598 (1964)). Therefore, presentation by ABC of one additional broadcast on an issue which had been the subject of many other broadcasts occupying large amounts of time cannot be said, in and of itself, to have created an additional obligation to present still another broadcast on the opposite side. ABC clearly acted within its discretion.

(J.A. 138.) After disposing of the fairness doctrine complaints for lack of merit the Commission denied DNC's request for an evidentiary hearing and denied the RNC request for production of logs, documents and other data.

II. The Fairness Doctrine

It is not necessary for us to undertake a lengthy study of the fairness doctrine from its historical perspective as this has recently been done most comprehensively by the Supreme Court. *See Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 375-86 (1969). As this court noted in *Green* v. *F.C.C.*, — U.S.App.D.C. ——, ——, 447 F.2d 323, 327

(1971) the doctrine has most recently been elaborated on by the FCC in response to the Supreme Court's decision in *Red Lion*. In *In re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 F.C.C.2d 27, 28 (1970) the Commission stated:

> The fairness doctrine was evolved as a policy under the public interest standard in a series of cases, given its definitive policy statement in the Commission's 1949 *Editorializing Report* (13 F.C.C. 1246), and codified into the Communications Act of 1959. See Section 315(a) 47 U.S.C. 315(a); *Red Lion Broadcasting Company, Inc.* v. *Federal Communications Commission, supra*. It requires the broadcast licensee to afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. The Commission early determined that if the fairness doctrine were to achieve its most salutary purpose, an affirmative obligation in this respect must be imposed upon the licensee. . . .
>
> The Commission's general approach to this facet of the fairness doctrine is set forth in a 1964 ruling. *Letter to Mid-Florida Television Corporation*, 40 F.C.C. 620, 621 (1964):
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> > . . . The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. . . .

The importance of the fairness doctrine is neither academic nor is it an administrative nicety. As the Commis-

sion stated: "The keystone of the fairness doctrine and of the public interest is the right of the public to be informed—to have presented to it the 'conflicting views of issues of public importance.'" *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10416, 10418, 40 F.C.C. 598, 604 (1964). *See also Letter to Cullman Broadcasting Co.*, 40 F.C.C. 576 (1963). The need for the doctrine is apparent to even the least initiated after considering that broadcast frequencies are indeed limited and "they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S.REP.No. 562, 86th Cong., 1st Sess. 9 (1959). The importance of the doctrine is evident and it is the manifest intention of the Commission to maintain it as a viable instrument in protecting the right of the public to be fully informed on controversial issues.[5]

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[5] On June 9, 1971 the Commission adopted a Notice of Inquiry *In the Matter of the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 F.C.C.2d 26 (1971). In the words of the Commission:

> The purpose of this Notice is to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies, in light of current demands for access to the broadcast media to consider issues of public concern. It is important to stress that we are not hereby disparaging any of the *ad hoc* rulings that we have made in these areas. Rather we feel the time has come for an overview to determine whether the policies derived largely from these rulings should be retained intact or in lesser or greater degree modified . . . . Interested parties may address [any aspect of the problem.]

Thus it is clear that the Commission is seeking to maintain the efficacy of the doctrine while guaranteeing adequate access to the public on controversial issues. It is encouraging to note that the Commission has sought widespread in-put in formulating its thinking in this crucially important area.

By its very nature the fairness doctrine is one which cannot be applied with scientific and mathematic certainty. There is no formula which if followed will assure that the requirements of the doctrine have been met. Procedurally, the doctrine can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with coverage of controversial issues.

> [T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming.

Applicability of the Fairness Doctrine, supra, 29 Fed. Reg. at 10416, 40 F.C.C. at 599. The Commission has indicated that it will exercise substantial restraint in this area.

> In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement.

Id.[6] In the exercise of its discretion the broadcaster must

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[6] This same general theme was espoused by the Commission much earlier in Editorializing by Broadcast Licensee, 13 F.C.C. 1246 (1949):

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of

be mindful that Congress did not intend the doctrine to work as a mode of suppressing the broadcast of controversial views. Its intention was rather to "[require] the expression of all conflicting views on issues of public importance." Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 LAW AND CONTEMP. PROB. 278, 285 (1969).

Nowhere has the duty of the broadcaster under the fairness doctrine been described better than by the Supreme Court in *Red Lion*.

> The broadcaster must give adequate coverage to public issues, . . . and coverage must be fair in that it accurately reflects the opposing views. . . . This must be done at the broadcaster's own expense if sponsorship is unavailable. . . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.

Red Lion Broadcasting Co. v. *F.C.C.*, *supra*, 395 U.S. at 377-78.

It is not necessary for us to undertake a lengthy discussion of all of the cases decided under the fairness doctrine for us to dispose of petitioners' claims in this case. A reading of *Red Lion* and several of our recent opinions in this area makes it clear that there has been no violation by the Commission in dealing with the petitioners' fairness doctrine complaints.

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presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view.

Id. at 1251.

The *Red Lion* litigation was borne of a dispute originally before this court. *Red Lion Broadcasting Co.* v. *F.C.C.*, 127 U.S.App.D.C. 129, 381 F.2d 908 (1967), *affirmed* 395 U.S. 367 (1969). The case involved the right of reply to a personal attack broadcast over the petitioner station. The Commission held that the broadcaster was in breach of his obligation under the doctrine as espoused in *Times-Mirror Broadcasting Co.*, 24 P. & F. Radio Reg. 404 (1962), which required that a tape, transcript or summary of the broadcast containing the attack be sent to the wronged party and that an offer of reply time be made to him. It required the station to provide such reply time regardless of whether the wronged party would pay for it. We held the Commission's position to be constitutional and affirmed. 127 U.S.App.D.C. 129, 381 F.2d 908 (1967). As the Supreme Court points out, the personal attack rule developed shortly after the *Red Lion* litigation commenced. This provision, 47 C.F.R. § 73.123 (1971), is set out in the margin.[7] The Supreme Court held that the application of the

[7] § 73.123 Personal attacks; political editorials

(a) When during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but

personal attack corollary to the fairness doctrine and the promulgation of the enforcement provisions was both valid and constitutional and they enhanced, rather than abridged, the First Amendment freedoms of speech and press. *Red Lion Broadcasting Co.* v. *F.C.C., supra,* 395 U.S. at 375. Speaking specifically to the constitutional issue, the Court said:

> In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has

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the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (b)(3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (b)(2), above. See, section 315 (a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F.R. 10415. The categories listed in (b)(3) are the same as those specified in section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate to respond over the licensee's facilities:

Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provision of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

been part of the law since 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U.S. 525 (1959).

Id. at 391, (footnote omitted). Consistently, it has been held that unless the facts call for equal time under the personal attack corrollary or the "equal opportunities" doctrine of 47 U.S.C. § 315 (1964) the fairness doctrine in no way requires equal time. The doctrine solely calls for a determination of whether the licensee has given sufficient opportunity for contrasting viewpoints to be heard on controversial issues of public importance. "The critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one, can be said to constitute a reasonable opportunity to inform the public on the contrasting viewpoint—one that is fair in the circumstances." *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 295 (1970). *See also Letter to Nicholas Zapple*, 23 F.C.C.2d 707 (1970).

In recent months this court has had at least four cases dealing in one respect or another with the fairness doctrine.[8] In the first of these cases, involving requests for time to counter military enlistment commercials on the media, Judge Wilkey wrote that the doctrine did not require identical treatment for differing viewpoints of con-

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[8] Green v. F.C.C., — U.S.App.D.C. —, 447 F.2d 323 (1971); Business Executives' Move for Vietnam Peace v. F.C.C., No. 24,492, decided August 3, 1971; Friends of the Earth and Gary A. Soucie v. F.C.C., No. 24,556, decided August 16, 1971; Columbia Broadcasting System, Inc. v. F.C.C., No. 24,655, decided November 15, 1971. The Ninth Circuit has also issued an opinion in the area recently, *see* Neckritz v. F.C.C., 446 F.2d 501 (9th Cir. 1971).

troversial issues, "as this would place an onerous and impractical burden on the licensees." *Green* v. *F.C.C.*, *supra*, —— U.S.App.D.C. at ——, 447 F.2d at 328. In addition we made it clear that unlike those corrollaries to the doctrine that create equal-opportunities situations the doctrine itself does not create a right for any person or group to be granted time. "[T]he licensees may exercise their judgment as to what material is presented and by whom. . . . The fairness doctrine is issue-oriented, and it would be sufficient if each licensee could show that the point of view advocated by petitioner . . . had been or was being presented on its station by others." *Id.* In our opinion in *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, *supra*, we held that "[u]nder the permissive 'reasonableness' standard of the fairness doctrine, acceptance of [a] particular format is by no means compulsory." *Id.*, slip op. at 8. Thus, in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine and we have clearly stated time after time, *ad infinitum ad nauseam*, that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee. *See also Neckritz* v. *F.C.C.*, 446 F.2d 501, 502 (9th Cir. 1971).

In examining the specific complaints of petitioners in the cases at bar it is evident that the general fairness doctrine is applicable in both instances. RNC seeks a right to reply on the basis of the Commission's ruling in *Zapple*. The *Zapple* ruling created a new corollary to the fairness doctrine known as the "political party" doctrine. *Letter to Nicholas Zapple*, *supra*, 25 F.C.C.2d at 742-43. We have spoken to this issue most recently and have there rejected RNC's contention. *Columbia Broadcasting System* v. *F.C.C.*, No. 24,655 (D.C. Cir. November 15, 1971). Reason and logic teach us that an unjust result would be reached by giving one political party an opportunity to respond to a second party which had been given the opportunity to respond to the President who is a member of the first

party. Any other result would be clearly erroneous. Should we grant RNC an opportunity to respond to DNC we would embark upon a course of request after request. We refuse to sanction the commencement of such an unending circle. It is somewhat more difficult to dispose of DNC's complaint. In reality DNC is asking this court, as it unsuccessfully sought from the Commission, to create a new corollary to the doctrine. They seek a ruling whereby each time a President addressed the nation the opposition party would be entitled to an "equal opportunity" under § 315(a) of the Communications Act, 47 U.S.C. § 315(a) (1964).[9] We believe this position to be an unacceptable one.

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[9] § 315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

It has been held that addresses by the President are subject to the fairness doctrine when they concern controversial issues of public importance. *Letter to Republican National Committee*, 40 F.C.C. 625 (1964); *Letter to Blair Clark*, 11 F.C.C.2d 511 (1968). At the same time the Commission has held that "equal opportunities" do not apply to presidential addresses unless the President is a legally qualified candidate and his speech comes under one of the provisions of § 315. *Committee for the Fair Broadcasting of Controversial Issues, supra*, 25 F.C.C.2d 283. As the Commission has stated:

> We have long stressed the different manner in which "equal opportunities" and fairness requirements of Section 315 operate. The former is applicable only to uses of station facilities by candidates for public office and calls for *equal* treatment—as to the amount of time to be afforded, the nature of the time slot, etc. It thus works with virtually mathematical precision.

Id. at 291 (emphasis in original).[10] As the Commission

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[10] In Committee for Fair Broadcasting, *supra*, 25 F.C.C.2d at 292, the Commission explained its reasons for supporting the doctrine:

> We do not believe that any extended discussion is needed as to why the licensee is afforded so much discretion under the fairness doctrine. In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts; interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deply in broadcast journalism; we would indeed become virtually a part of the broad-

noted, equal opportunities for controversial issues was not the aim of Congress.

> In 1959 Congress codified the fairness doctrine, by inserting the provision in Section 315(a) that broadcast licensees "must operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on controversial issues of public importance." The conference report makes clear that this was a Congressional "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H.Rep. No. 1069, 86th Cong., 1st Sess., p. 5 (1959)). . . . And, finally, the Supreme Court's opinion in *Red Lion* significantly recognizes the *Editorializing Report* as the statement of the basic principles embodied in the fairness doctrine. *See Red Lion, supra,* at pp. 384-386.

Id. at 293, (emphasis in original). *See generally* 67 CONG. REC. 12502-04. We cannot stress too strongly that this doctrine nowhere requires equality but only reasonableness.[11] "The critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one, can be said to constitute a reason-

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casting "fourth estate," overseeing thousands of complaints that some issue had not been given "equal treatment." We do not believe that the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental intervention to insure such mathematical equality.

Footnote omitted.

[11] In fact, equality will not always be sufficient in response to a controversial issue. In a personal attack situation a 10 second statement that a party was a fascist or communist might require that more than 10 seconds be given to the party attacked to explain and refute the representation.

able opportunity to inform the public on the contrasting viewpoint—one that is fair in the circumstances." *Id.* at 295.

One of the problems faced by DNC is the coverage given the President by the media and it is obviously because of this wide exposure they seek our creation of a new corollary. We are not unsympathetic to the plight of the party out of the White House but sympathy cannot be allowed to deter the public from the maximum information it can obtain. One of the primary sources for public information concerning the nation and its welfare is from the Presidential broadcast. While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position the President is a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and as this obligation exists for the good of the nation this court can find no reason to abridge the right of the public to be informed by creating an automatic right to respond reposed in the opposition party. In matters which are non-political the President's status differs from that of other Americans and is of a superior nature. Of course, as a candidate the President is subject to the same terms of § 315 as apply to other candidates. Some will proffer that a first term President is involved in his political re-election campaign from the date of his inauguration, however, we believe that adoption of this view would only serve to frustrate the ability of the President and the licensees to present authoritative Presidential

reports to the public. The burden is, of course, to distinguish between the President *qua* President and the President in his political capacity. This burden must fall to the Commission in ruling on requests such as that filed by DNC.

In examining the broadcasts to which DNC seeks the right of reply we feel that it is not possible to give any encouragement to DNC for the position it has espoused. The first broadcast to which DNC seeks to reply was the March 15, 1971 interview by Barbara Walters on NBC's "Today" show. The interview centered on the President's family life, his public career and his family, and the role Mrs. Nixon plays in his decision making process. He also spoke of the achievements of his Administration as compared to those of previous Administrations.[12] We can find no justification for granting DNC, or any other spokesman, a right to reply to this type of personal interview of a non-candidate. As the leader of the American people, his life and that of the members of his family is a topic of great interest to a large segment of the population. People are interested in the President as a person and appreciate the intimate glance into his private life afforded by such interviews as this.

The second program to which DNC seeks to reply is "A Conversation With the President," an hour-long interview of the President by Howard K. Smith on ABC. The interview took place on March 22, 1971.[13] While this program did not delve into the personal life of the President, it did extensively consider his program and the rationale for some of his more important actions and decisions. The President is expected to consent to such interviews from time to time and is not expected to isolate himself from the media. This is essential in a free society. To the extent

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[12] These latter topics unquestionably are subject to the traditional requirements of the fairness doctrine.

[13] See pages 4-5 for a description of the broadcast.

that the President's interview dealt with controversial issues of public importance it comes within the bounds of the fairness doctrine. It is not, however, for either the Commission or this court to encroach upon the discretion of the licensee in absence of an apparent abuse of this discretion. *See Letter to Republican National Committee, supra; Letter to Blair Clark, supra.* Should the licensee in good faith be satisfied that its broadcasting has created a reasonable balance and opportunity for opposing views to be heard on controversial issues, then there is no prima facie reason for Commission action. Should the licensee feel that there is an imbalance in its programming then it is obliged by the terms of this doctrine to seek out and create balanced coverage in controversial areas. By virtue of the very nature of the fairness doctrine there must be substantial voluntary good-faith compliance by the licensees. The record before us is bare of any suggestion to the contrary.

The final presentation challenged by DNC is the President's address to the nation of April 7, 1971 on the war in Southeast Asia. This speech was broadcast simultaneously on all three major networks on both radio and television. In response to DNC's request for time only ABC allowed time to respond and broadcast "Indochina: Another View" on April 22, 1971. As NBC and CBS felt their coverage of the war issue was a balanced one, they rejected DNC's request. Again, in the absence of a clear showing of abuse of discretion we have no justification for compelling reversal of these positions. As we have previously noted RNC sought to respond to this presentation but ABC refused to grant time for that purpose.

RNC contends that it represents a point of view which has not been adequately represented by others, *i.e.*, the view of the Republican Party as a political party. It is based on this assertion that RNC seeks to respond to DNC. The DNC broadcast was permitted by ABC in fulfillment of its obligation to assure balanced coverage of a contro-

versial issue. In the view of ABC's management DNC was a proper spokesman and "Indochina: Another View" would achieve the balanced coverage required under the doctrine. This does not intimate that following the DNC broadcast there would be imbalance and that ABC would be required to seek balance by issuing time to RNC. The requirement of mathematical equality is non-existent in this situation. *Committee for Fair Broadcasting, supra,* 25 F.C.C.2d at 292. In addition, we believe that RNC's position is somewhat naive. It is apparent that the President, while not officially a spokesman of RNC, is the titular leader of his party and that his program, policies and achievements are those of his party. More often than not, the views of the President and of the RNC are likely to coincide.[14]

III. The Request for Network Logs

RNC complained that ABC failed to take all of its programming into consideration in determining whether it had indeed complied with the requirements of the fairness doctrine. Specifically, RNC questions whether ABC had taken its non-news programming into consideration, *e.g.*, appearances by anti-war spokesmen on the Dick Cavett show. As ABC did not reply to RNC's inquiry on this subject, RNC made a formal request of the Commission to compel ABC to provide

> any logs and other documents which would show the time used on ABC during the period February 8 to April 8, 1971, for the discussion of various viewpoints on the Indochina issue. This would make possible a determination of whether ABC has made a substantial error in fixing the balance of conflicting viewpoints.

(J.A. 79.) The Commission refused this request on the grounds that program logs are not required to be made

[14] *See generally* C.B.S. v. F.C.C., *supra.*

available to the public. (J.A. 138.)[15] The Commission has described the evidentiary burdens on the complaining party who alleges violation of the doctrine.

> Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time. Accordingly although the Commission intends also to employ other appropriate procedures to insure compliance by licensees with the fairness doctrine (*e.g.*, in-depth spot checks at renewal time), it has long been our policy normally to require that fairness doctrine complaints (*a*) specify the particular broadcasts in which the controversial issue was presented, (*b*) state the position advocated in such broadcasts, and (*c*) set forth reasonable grounds for concluding that the licensee in his overall programming has not attempted to present opposing views on the issue.

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[15] Under the terms of the Communications Act of 1934 the Commission is empowered to require individual licensees "to keep such records of programs . . . as [the Commission] may deem desirable." 47 U.S.C. § 303(j) (1964). Based upon this statutory prescription the FCC requires that the licensee maintain logs of programs broadcast over the licensee's facilities in a certain form. 47 C.F.R. §§ 73.669(c), 73.670 (1971). These logs are usually retained for two years and must be made available to authorized Commission staff upon request. 47 C.F.R. §§ 73.673, 73.674 (1971). There requirements do not extend to the networks, however, only to the licensees.

See Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 F.R., 10415 (1964).

Allen C. Phelps, 21 F.C.C.2d 12, 13 (1969). This court has deemed these requirements to be a "not unreasonable standard." *Hale v. F.C.C.,* 138 U.S.App.D.C. 125, 128, 425 F.2d 556, 559 (1970). We endorse the reasoning of the Commission as expressed in *Robert G. Ryan,* 25 F.C.C.2d 884, 885 (1970):

> [I]f the Commission were to require stations or networks to come forward with specific evidence such as tapes or transcripts of programs each time someone raised a fairness question regarding someone such as the Vice-President, who by the nature of his office appears regularly on the media stating and discussing his views and philosophies on the problems facing the country, the burden so cast on the stations and networks would be most onerous and would substantially discourage the normal day-to-day presentation of broadcasts.

This court finds itself at a loss in attempting to determine why ABC should be compelled to present the documents and logs requested. The opinions of the Commission are clearly apposite and we have held the Commission standard to be a reasonable one. *Hale v. F.C.C., supra.* In addition, as we have pointed out in footnote 15, *supra,* there is no obligation on the network to maintain logs, *only* the licensee. We cannot require presentation of logs which there is no obligation to maintain. The most curious matter, however, is why we should compel production of information already in the hands of RNC. ABC responded to an earlier DNC complaint on April 29, 1971. This response was available to RNC and answered all of the questions presented including those with reference to the Dick Cavett Show. We set out the ABC response in the

margin.[16] Finally, in a letter to RNC ABC asserted that in determining the fairness of its coverage of the war issue there was "a careful and thorough analysis of *all* the coverage previously given the issue over ABC's Television

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[16] As the DNC is no doubt aware, ABC has covered the War in Southeast Asia on a continuing and balanced basis for the past ten years, and during that period virtually every significant viewpoint on this issue has been presented over ABC's facilities. Since President Nixon's election, ABC has repeatedly presented not only the President's views but also those of Democratic critics of his policies. For example, during the period February 8 through March 27, 1971, approximately 11½ minutes in ABC's "Evening News" and "Weekend News" programs were devoted to views which differ from the Administration's position and policies in Indochina. During this same period, approximately 15½ minutes in these newscasts presented views which favored the Administration's position and policies. Between March 28 and April 11, 1971, almost twelve minutes in regular ABC newscasts were devoted to views critical of the Administration's course of action and policies in Indochina, while approximately 4 minutes were devoted to viewpoints in support of Administration policies on this issue.

The War in Southeast Asia has also been discussed extensively on ABC's ISSUES AND ANSWERS in recent months. Several individuals, including Admiral Zumwalt on January 17 and Admiral Moorer on March 14, have supported Administration policies on broadcasts in this series. In addition, the following guests have appeared on ISSUES AND ANSWERS since January 1, 1971 and have presented views differing from those held by the Administration on the war issue at length: February 7, Senator Edmund Muskie (D-Maine); February 14, Representatives Shirley Chisholm (D-New York) and Ronald Dellums (D-California); March 21, Senator George McGovern (D-South Dakota); April 4, Senators John Sherman Cooper (R-Kentucky) and Frank Church (D. Idaho).

Although the DICK CAVETT SHOW is not under the supervision of ABC News, varying viewpoints in relation to the Indochina War have also been presented in this series. Guests appearing on this show since January 1, 1971, including both supporters of the Administration's policies in Southeast Asia as well as those who differ from the President's approach to the War, have expressed a broad range of divergent opinion on this subject.

J.A. 55.

Network." (J.A. 63, 94; emphasis added.) There is no reason to order production of either logs or other documents.

IV. DNC's First Amendment Assertions

DNC makes two major claims relating to the First Amendment. They first contend that the FCC has construed the fairness doctrine in such a way as to deny them the relief sought. DNC argues that this construction is inconsistent with the First Amendment. The second claim is that the procedures used by the Commission in processing complaints under the fairness doctrine are inadequate to protect those rights guaranteed by the First Amendment. We have given both of these contentions careful consideration but for the reasons set out below we are forced to reject them.

There is no disagreement with the proposition that "broadcasting is clearly a medium affected by a First Amendment interest." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 386. Despite this recitation we have not yet reached the stage of being able to determine with any surety precisely the scope of the First Amendment's impact on the broadcast media.[17] The opinion of

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[17] Judge Wright made this clear in the following excerpts from his opinion in Business Executives' Move for Vietnam Peace v. F.C.C., No. 24,492 (D.C. Cir. August 3, 1971):

> It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[10] Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress.
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> [*Red Lion*] justified the Commission's interference with broadcasters' free speech by invoking specifically constitu-

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[10] *See e.g.,* United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

Slip. op. at 11.

the Supreme Court in *Red Lion* is the definitive holding with reference to First Amendment freedoms and the broadcast media. According to the Court in that case, the primary concern in the broadcast industry is "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 392. In light of the fact that there are only a limited number of broadcast frequencies available for private use[18] the interests of the public are further enhanced.

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners and not the right of the broadcasters which is paramount. . . . It is the right of the

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tional rights of the general public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their . . . collective right to have the medium function consistently with the ends and purposes of the First Amendment.[11] It went on to say:

". . . The right of free speech of a broadcaster" . . . does not embrace a right to snuff out the free speech of others. . . .

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. . . [A] licensee has no constitutional right . . . to monopolize a radio frequency to the exclusion of his fellow citizens. . . .

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. . . It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[12]

Slip op. at 12-13.

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[11] 395 U.S. at 390.

[12] Id. at 387, 389, 390.

[18] This was recognized by the Supreme Court early in the history of public broadcasting. For an interesting exposition see Mr. Justice Frankfurter's opinion in National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

> public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

Id. at 390.

The crux of the DNC First Amendment allegations is that the President, by the virtue of his position, is capable of dominating the broadcast media at will and can prescribe the scope, focus and content of national debate on the major issues of the day. "When the President enjoys unfettered access to television and an effective right to respond is denied, there is a very real danger that such domination will come about by default." (DNC Br. at 34.) DNC further contends that it will only be the voice of the President that is heard clearly and that the public will not be permitted exposure to opposing viewpoints thereby depriving the public of its rights to be an informed electorate. DNC continues by seeking an automatic right to respond to the President since it is their feeling that only by right of access to the media can DNC reach the vast audience that television makes available.

> [DNC] was seeking equality with the President in exercising its right to speak, and speak effectively, on issues affecting the conduct of government. Denial of the right is a matter of First Amendment concern. . . . But petitioner was seeking to do more than exercise a right. It was also attempting to carry out its responsibility as one of the two major political parties to define the options open to the American people on major public issues. In this sense, petitioners assertion of its rights was co-extensive with the public's First Amendment right of access to all viewpoints on public questions.

(DNC Br. at 35.) DNC insists that the Commission's ruling infringes upon protected First Amendment rights. We believe they are mistaken. The rights protected by the First Amendment are designed to insure an open forum

for robust discussion. That is precisely the purpose of the fairness doctrine. No one disputes that the public has a right to be informed. That proposition is supported by the Commission, the courts, RNC, DNC, and the networks. The only question that has been raised is what must be done to insure that the public is adequately informed. DNC suggests that there be an automatic right to respond to Presidential appearances. Furthermore, they assert that as the leading party out of the White House and as the majority party in Congress they would always be an appropriate party to respond. DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task? At times the President speaks to crucial problems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States. If DNC were correct in their contentions this illusionary First Amendment right would extend right of response to address by State governors and city mayors. We believe DNC's position to be fallacious and point to our recent decision in *Green v. F.C.C., supra,* where we state that no individual or group "has the right of access to the air; the licensees may exercise their judgment as to what material is presented and by whom." — U.S.App.D.C. at —, 447 F.2d at 328. There is nothing in either the First Amendment or the case law to negate this reasoning. As to the contention that without this automatic right only the voice of the President is heard clearly we can only say that while this may be a persuasive debate argument we question its validity here. Daily all of the media—not

merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking. We see no need for supplementation based on some theoretical right in the First Amendment which at best has gone undefined in this litigation.

The second set of contentions involves alleged procedural flaws which affect First Amendment rights. The alleged procedural defects number three: (1) the time it took the FCC to issue its opinion in this case, (2) the burden of proof on petitioners under *Phelps* and (3) FCC's failure to hold an evidentiary hearing on DNC's claims.

In consideration of the first matter, this court is in total agreement with DNC. The Commission should reach a disposition of all fairness doctrine complaints as swiftly as possible within the realm of responsible administrative decision-making. No one benifits by long delays in this area. However, this does not mean to imply that the Commission has committed reversible error. The FCC is charged with far more than decision of complaints emanating from the fairness doctrine. The Commission is responsible for the total scheme of regulation in the field of radio and television communication. This being the case, the Commission cannot always consider a complaint, come to a conclusion, write an opinion and perpare it for issuance as quickly as a given petitioner would like. We do not believe that the time lapse in this case served to deprive petitioners of their First Amendment rights.

The second procedural aspect which we must examine relates to the allocation of the burden of proof. We are in agreement with the Commission and the intervenor-networks that DNC has failed to preserve this issue for re-

view by this court as it did not raise the claim before the Commission. *See* 47 U.S.C. § 405 (1964); *Green v. F.C.C., supra*, —— U.S.App.D.C. at ——, 447 F.2d at 329. Nonetheless, even if *arguendo* DNC did preserve its claim the law on the matter is clear. The initial burden in cases emanating from a fairness doctrine complaint rests not with the licensee but with the complaint. *Allen C. Phelps, supra*.[19] Simply stated, the DNC has failed to meet that burden in this case. DNC failed to prove before court and Commission that the programming of which it complains did not meet the general requirements of the fairness doctrine.

The third procedural argument raised by DNC claimed a right to an evidentiary hearing. Let us look at the results of adopting such a rule. Presently, the Commission receives a substantial number of fairness doctrine complaints in a given year. Based on the DNC request the Commission would be forced to hold evidentiary hearings on each of these complaints, many based on insubstantial claims of unfairness. A consideration of the factual questions for such a hearing, as suggested by DNC, which we set out in the margin,[20] makes it clear that an immense burden would

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[19] See text at pp. 30-31.

[20] DNC proposed the following questions for evidentiary hearing:

> 1. How much time has each network accorded the views favoring or opposing the Administration's on the pertinent controversial issues of public importance during the relevant period?
>
> 2. In what formats and under whose control have these views been presented?
>
> 3. Is control over time and format relevant in assessing the impact of the presentations on the viewers?
>
> 4. Which opposition spokesmen have been selected to respond to Presidential views and on what basis?
>
> 5. What pressures, if any, has the White House exerted on the networks to make broadcast time available to the Presi-

face both Commission and broadcaster. The current DNC complaint that four months was an undue delay would soon be replaced by much greater periods of time necessitated by the weeks it would take to hold the proposed evidentiary hearing. Such delay would surely have a "chilling" effect on the rights of all involved.

We find nothing in the statutory law, either in the Communications Act of 1934 or elsewhere, which would require an evidentiary hearing under these circumstances. In its *Fairness Primer* the Commissioner has laid out its methodology for handling complaints arising from the fairness doctrine.

> If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action.

Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598,

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dent, to control the time and format of the programs in question, and to preclude opposition spokesmen from receiving significant amounts of air time in which to respond?

6. What is the impact on the public of repeated Presidential broadcasts on the same subject in prime time when no direct response to these broadcasts is permitted?

7. What types of responses are necessary or appropriate to Presidential broadcasts or a series of Presidential broadcasts to insure balanced coverage?

J.A. 118. A consideration of these questions leads us to believe that DNC seeks to have the Commission exercise a journalistic discretion in place of the licensee. This is clearly impermissible.

600 (1964). It is now, as it has always been, the practice of the Commission to deal with alleged violations of the fairness doctrine by written submission rather than by evidentiary hearng. Because of ths informal procedure the *Red Lion* litigation came to fruition. In that case the Supreme Court said nothing to suggest that this informal procedure was an improper one.[21] We conclude, therefore, that an evidentiary hearing was not required in the case at bar.[22]

V. Conclusion

The scope of judicial review in this area was spelled out thirty years ago by Mr. Justice Frankfurter.

> Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the . . . [r]egulations. The responsibility belongs to Congress for the grant of valid legislative authority and to the Commission for its exercise.

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[21] Hearings are only required under the Communications Act when granting, modifying, or renewing a station's license or in granting a construction permit. 47 U.S.C. §§ 307(a), 309(e). Under the terms of the Administrative Procedure Act (APA) hearings are required only in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). Since there is no requirement of a hearing under the Communications Act this section of the APA is clearly inapplicable. *See* Titusville Cable TV, Inc. v. United States, 404 F.2d 1187, 1192 (3rd Cir. 1968); Conley Electronics Corp. v. F.C.C., 394 F.2d 620, 625-26 (10th Cir.), *cert. denied*, 393 U.S. 858 (1968).

[22] We have considered DNC's argument that an evidentiary hearing was required as a matter of due process, however, we dismiss it as being without merit.

National Broadcasting Co. v. *United States, supra,* 319 U.S. at 224. This is our instant case. It is our belief that the findings of the Commission are supported by the evidence and are within the scope of authority promulgated by the Congress. We have carefully considered the Commission's Memorandum Order and Opinion and find that it is neither arbitrary, whimsical, or capricious.

> [A] court's role is limited to deciding whether the Commission's order is unreasonable or in contravention of statutory purpose. In making such a determination a court "is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative power." American Tel. & Tel. v. United States, 299 U.S. 232, 236 (1936). *See generally,* K. Davis, Administrative Law Treatise 5.03 (1958).

Neckritz v. *F.C.C., supra,* 446 F.2d at 502-03.

DNC asks us to give birth to a new corollary. We are not the body to pass on such a request. Those who advocate the adoption of new standards have, of course, access to both the Commission and the Congress. No number of law suits can give this court a legislative authority, nor would we exercise such an authority to which we are clearly not entitled. Finding no error the Opinion of the Commission is

Affirmed.

APPENDIX B

Filed Feb. 2, 1972

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the opinion and order of the Federal Communications Commission on review herein are hereby affirmed.

Per Curiam
For the Court:
/s/ NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: February 2, 1972.
Opinion by Circuit Judge Tamm.

APPENDIX C

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

FCC 71-882 66516

In re Complaints of

DEMOCRATIC NATIONAL COMMITTEE against

National Broadcasting Company, Inc.
Columbia Broadcasting System, Inc.
American Broadcasting Company

REPUBLICAN NATIONAL COMMITTEE against

American Broadcasting Company, Inc.

Memorandum Opinion and Order

Adopted: August 20, 1971 Released: August 20, 1971

By the Commission: Commissioners Bartley and Houser concurring in the result; Commissioner Johnson dissenting; Commissioner H. Rex Lee absent.

1. The Commission has before it complaints filed on behalf of the Democratic National Committee (DNC) against the three major networks (ABC, NBC and CBS) alleging violation of the fairness doctrine and Commission policy and requesting free time to reply to appearances by the President. The networks and the Republican National Committee (RNC) have filed petitions opposing the complaints of DNC. RNC has also filed a complaint against ABC alleging violation of the fairness doctrine and requesting free time to reply to an appearance by Democratic spokesman on an April 22, 1971, broadcast. [ABC had given time to DNC to respond to an April 7 broadcast by the President.] All of the parties involved indicate that they recognize that the application of the fairness doctrine to Presidential addresses and to appearances by spokesman of the opposition party presents unusual diffi-

culties, previously recognized by the Commission. ABC urges the Commission to "take this opportunity to issue a definitive pronouncement which may serve to clarify the basic principles involved." DNC "concurs in this request," although it feels that a full-scale evidentiary hearing is required before such a pronouncement is made. (See Appendix for list of pleadings.)

SUMMARY OF PLEADINGS

2. DNC has argued that certain portions of the appearances by the President were "partisan" in nature and as such, fell within the language of two Commission decisions, *Nicholas Zapple*, 23 FCC 2d 707 (1970), and *Committee for the Fair Broadcasting of Controversial Issues*, (hereinafter also *Committee for Fair Broadcasting*) 25 FCC 2d 283 (1970). In the latter case, at 300, we held with regard to appearances by "spokesman for political parties":

> For example, if during an election period, [1] a network sold time to the RNC Chairman who made an attack on the Democratic Party, the fairness doctrine would be applicable and time would have to be sold, upon request, to the DNC for a response. If the attack had been made on free time then free time should be afforded for a response. In this really quasi-"equal opportunities" type of situation, it would not suffice for the network to say that it would present the DNC side by news clips or interview shows.

DNC has specifically sought to apply the above language to an ABC interview with the President on March 22, 1971, an NBC interview with the President on the March 15, 1971, "Today" program, and the President's speech of April 7,

[1] DNC notes that while this language refers to an election period, the broadcasts upon which the decision was based occurred during a non-election period and therefore the ruling extended the *Zapple* ruling to such times. See paragraph 16 *infra*.

1971, broadcast by NBC and CBS.[2] The complaints refer to specific passages in the programs which are allegedly "partisan" and which in the belief of DNC constitute remarks by the leading spokesman for the Republican Party, "who is constantly 'campaigning' for reelection to office." The complaints cite instances in the programs where it is claimed that the President "placed the blame for the war on the Democratic Party," asserted the success of Laotion and Cambodian military operations, explained his reasons for not setting a date for the withdrawal of American forces from Vietnam, discussed his revenue sharing proposals and expressed his views on a number of other controversial issues of public importance. In addition to requesting time on the basis of the alleged "partisan" views expressed by the President in the three appearances cited above, DNC has requested time, under the fairness doctrine, to reply to these and four other Presidential appearances broadcast by the networks.[3] In support of this request, DNC cites another portion of the Commission's ruling in *Committee for Fair Braodcasting, supra*, at 297:

> We believe that in such circumstances [five uninterrupted prime time opportunities for the presentation of one side of a controversial issue of public importance, the war in Indochina, by the leading spokesman for that side] there must also be a reasonable opportunity for the other side geared specifically to the five addresses.

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[2] ABC also broadcast the President's April 7 speech but granted DNC time to respond to the broadcast on April 22, 1971. RNC's request to respond to the latter broadcast is summarized in paragraph 8 *infra*.

[3] Regarding the other appearances, all three networks broadcast the following prime time appearances by the President: an hour long interview with reporters on January 4, 1971, the State of the Union message on January 22, 1971, the March 4, 1971, press conference dealing with foreign affairs, and the April 29, 1971, press conference.

DNC contends that the networks' coverage of the issues discussed by the President has failed to meet the standards of the above quotation since the beginning of 1971.

3. The networks and RNC have replied to the complaints by citing various Commission decisions, particularly *Committee for Fair Broadcasting*.

4. With regard to the application of the Commission's *Zapple* ruling to the April 7 address of the President, CBS cites the following language in *Republican National Committee*, 25 FCC 2d 739, 744 (1970), (which denied the petitions for reconsideration of CBS, DNC and RNC arising out of *Committee for Fair Broadcasting, supra*):

> However, Presidential appearances (other than as a candidate for re-election, when of course "equal opportunities" would be applicable, or, in the event of its [Section 315] repeal, fairness in the "political party" sense) do not come within the [*Zapple*] doctrine. . . . Thus, when the President delivers a veto message or informs the nation concerning his decision on Cambodia, he is not making an appearance within [*Zapple*].

CBS states that every Presidential appearance is in a sense "political" or "partisan" due to the fact that the President is the "unquestioned leader and spokesman of his party," but that the "central thrust" of the April 7 address was an explanation of the Administration's policies in Indochina and on that issue CBS has met the requirements of the fairness doctrine.

5. Regarding the general fairness complaint of DNC, CBS states that it has broadcast only one uninterrupted prime time appearance (the April 7 address) by the President dealing solely with the Indochina issue since January 1, 1971, although it broadcast other appearances by the President in which the issue was discussed, and one other uninterrupted appearance in which other issues were dis-

cussed.[4] CBS cites the following language of the Commission in *Committee for Fair Broadcasting, supra,* at 294-5:

> But it [the fact that the fairness doctrine applies to Presidential addresses] does not mean that the Presidential speeches must be considered in isolation or that the licensee loses the discretion afforded him under the fairness doctrine as to the manner in which he achieves compliance with the doctrine. . . . In the case of Presidential addresses, there is no requirement that they be met by countering addresses.

CBS contends that, in this regard, it has complied with the fairness doctrine. CBS has listed a series of programs in which views opposing the President's views on the Indochina war were presented. It states that since the first of the year, it has presented over one hour of news specials and special reports and over one hour of news interviews containing such opposing views, in addition to its regularly scheduled news coverage.[5] (See paragraph 10 *infra,* for further CBS response.)

6. NBC has responded to the complaints against it by stating that the President's use of television has not been "unprecedented" as suggested by the complainant, but comparable with the use by the two previous Democratic Presidents. NBC refers to broadcasts it has presented which it states contained the expression of views contrasting with those of the President during his April 7 address, *viz.,* the March 15, 1971, "Today" program and four other broad-

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[4] See footnote 3.

[5] CBS also refers to a prime time broadcast on November 24, 1970, of the program "60 Minutes" which reported on the candidacy of Senator McGovern, another interview program on November 29, 1970, which presented opposing views on the Indochina war, and the broadcast of the "Loyal Opposition" on September 5, 1970, which was designed to fulfill CBS's obligation under *Committee for Fair Broadcasting, supra.*

casts since the first of the year.[6] Among these was a one-hour prime time broadcast on April 30, 1971, which was devoted solely to the expression of the views of six leading Democratic spokesmen. NBC also cites *Republican National Committee, supra* (cited by CBS and quoted in paragraph 4 above) to counter DNC's contention that the two appearances of the President on NBC were "partisan" in nature and subject to a response by the opposing political party.

7. ABC, in its response to the complaint, claims compliance with the fairness doctrine and Commission rulings with regard to the issues discussed by the President in his two-hour interview with Howard K. Smith. It has delineated the issues discussed by the President and listed programs which it states contained contrasting views. ABC states that the programs also presented views contrasting with those expressed in other Presidential appearances broadcast by ABC.[7] Among these programs, ABC has listed an appearance by Senator Mansfield in response to the State of the Union address, the appearance by Democratic spokesmen selected by DNC in response to the April 7 address, as well as various news and interview programs broadcast since January 1, 1971. ABC states the belief that "under the guise of a 'fairness' complaint, the DNC is attempting to establish an automatic and absolute right to respond to each Presidential broadcast appearance." ABC contends that such a proposal is not required by the Communications Act or Commission policy.

8. RNC in its complaint against ABC seeks to obtain time to respond to the April 22 program "Indochina—Another View" which presented the views of six Democratic spokesmen selected by DNC. RNC maintains that this broadcast, unlike the Presidential appearance it was designed to balance, was an expression of the "partisan views of one of the

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[6] See the broadcasts listed in footnote 3.

[7] See the broadcasts listed in footnote 3.

major parties" on the war and as such called for an appropriate response by the Republican Party. RNC has also asked the Commission to "direct ABC to provide to the Commission and to RNC any logs and other documents which would show the time used on ABC during the period February 8 to April 8, 1971, for the discussion of various viewpoints on the Indochina issue." ABC has denied RNC's request for such information and a similar request from DNC.

9. DNC has replied to the networks' responses to its complaints by stating that the Commission's rulings in *Nicholas Zapple* and *Republican National Committee* apply to each of the broadcasts referred to in the complaint. The two interview programs, one on NBC and one on ABC, were "politically inspired" according to DNC because they were designed to promote the President's image and did not relate to the President's role as Chief Executive or Commander-in-Chief, as do Presidential addresses to the nation. Therefore, DNC contends, the interviews do not fall within the language of *Republican National Committee* which excluded Presidential addresses from the *Zapple* ruling. On the other hand, DNC acknowledges that the April 7 Presidential address technically falls within the language of *Republican National Committee* but maintains that the tone of the address was "highly partisan" and subject to the *Zapple* ruling. DNC submits that any definitive pronouncement by the Commission would require an administrative hearing because of the problems of format, control, impact and other problems involved in balancing views presented in Presidential appearances.

10. CBS, in a letter to the Commission of June 19, 1971, replied to the DNC response to the networks' reply to the DNC complaint. CBS states that DNC "has submitted no detail in support of its broad allegation that CBS' coverage of the Indochina issue has not been fair and balanced." It cites the Commission's ruling in *Allen C. Phelps*, 21 FCC 2d 12 (1969), where it was held that it would be unreason-

able to require licensees to disprove allegations absent detailed and specific evidence of failure to comply with the fairness doctrine. CBS states again that its coverage of the Indochina issue complied with the requirements of the fairness doctrine and Commission precedent and refers to its detailed summary of the programs it has presented to balance the April 7 Presidential address. Thus, CBS concludes, a hearing, as urged by DNC would be "totally unnecessary."

11. On June 16, 1971, the Commission received a letter from DNC commenting on the pleading submitted by RNC on May 12. DNC contends that if the Commission were to grant the RNC request for time to respond to the April 22 ABC broadcast, it would corrupt the fairness doctrine and "give the party controlling the White House two bites at the apple for every one given the opposition party." It again states that the President is the spokesman for the Administration and his party and that he defended Administration policies during the course of his April 7 address, a broadcast which dealt with the same issues that were presented in the DNC broadcast of April 22. DNC urges the Commission to reject the petition of RNC requesting time to respond to the April 22 broadcast.

Discussion

12. We shall first deal with the argument that the President's appearances fell within the holdings of *Zapple* and *Republican National Committee* on the grounds that they were partisan in nature. The Commission specifically stated in *Republican National Committee*, at 744, that "Presidential appearances (other than as a candidate for re-election, when of course 'equal opportunities' would be applicable . . .) do not come within the 'political party' [*Zapple*] doctrine." Thus, we do not feel that the *Zapple* ruling or its application in *Republican National Committee* should be applied to any of the Presidential appearances that are the subjects of the complaints before us. We feel

hat to extend *Zapple* or *Republican National Committee* to Presidential appearances would be wholly inappropriate. Presidents and other public officials (e.g., Governors, mayors) do report to the public, and such reports, as we have said, contribute to an informed citizenry. Of course, the officials in such reports are most often engaged in setting forth the wisdom of the particular actions on which the reports are given.[8] But this does not mean that this is a political party appearance to which given equal opportunities "is applicable." If that were so, the Commission would have, in effect, amended the Communications Act to specify that equal opportunities applies to all appearance of public officials. The Act, we believe, makes clear that it is fairness—not equal opportunities—which should govern here; and in any event, we believe it sound policy, for the reasons set forth in the *Fair Committee* ruling, that this situation—appearances of public officials during non-election periods—should come under the fairness doctrine with respect to controversial issues covered. The *Zapple* ruling thus remains applicable to time given to the political parties for their use as they see fit. *Republican National Committee, supra.*

13. RNC has sought to apply *Zapple, Committee for Fair Broadcasting,* and *Republican National Committee* to the April 22 broadcast of Democratic spokesmen on ABC, noting that the Commission, in *Committee for Fair Broadcasting,* applied *Zapple* to a response by the DNC to a previous Presidential appearance. However, we pointed out there that the licensee (CBS) had simply turned the time over to the DNC without any specification of issues. (Parenthetically, we noted that "the broadcast covered issues upon which the President has not expressed any viewpoint.") In

[8] Since this is so, and since it is a wholly impracticable quagmire for this agency to attempt to evaluate how much "partisan" material is contained in a particular report of a public official, we stress that our ruling here does not turn upon any such evaluation.

the ABC broadcast here at issue, ABC granted time to DNC for "an opportunity to discuss U. S. policy in Indochina and to discuss the differences . . . between the Democratic Party and Administration on the issue of troop withdrawal." ABC clearly exercised supervision over the issues discussed on the program to assure that it constituted a response to the President's speech of April 7 on Indochina, in contrast to the CBS broadcast by DNC on July 7, 1970, which we held to be "party-oriented" because of CBS' abstention as to the "issues to be covered." *Republican National Committee* at 745. While we stated in *Republican National Committee* that the *Zapple* ruling is not limited to broadcasts during election campaigns, we believe that it clearly is not applicable to a response presenting views in contrast to those previously broadcast, such as the DNC program of April 22.

14. Since the *Zapple* ruling does not apply to any of the broadcasts in question, the remaining portions of this ruling will deal with the licensees' compliance with the general fairness doctrine. The *Zapple* ruling, as it was originally promulgated, applied to appearances by supporters of or spokesmen on behalf of candidates during a political campaign, establishing a quasi-equal opportunities obligation on the licensee. *Republican National Committee* indicated that under certain circumstances the *Zapple* ruling may be applicable to appearances by spokesmen on behalf of a party at times other than during election campaigns. However, as we have stated previously in this ruling, *Zapple* does not apply to Presidential appearances during a non-election period and it applies only to appearances by party spokesmen in response to Presidential appearances when the licensee does not specify the issues to be treated as those which were discussed by the President. When appearances by party spokesmen in response to Presidential appearances are clearly limited to those issues discussed by the President, the licensee is exercising its discretion under the fairness doctrine to choose appropriate spokesmen to dis-

cuss contrasting views on controversial issues of public importance.

15. With respect to general fairness requirements, it is important to note that we have recently instituted a "broad ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies." (*Notice of Inquiry*, FCC 71-623.) The comments of the parties in this proceeding are welcome, particularly with respect to Section V of the Notice.

16. The Commission has been asked by DNC to apply the fairness doctrine to a number of Presidential broadcasts by the three networks, and RNC has asked that the fairness doctrine be applied to the DNC program broadcast by ABC. Our opinion in *Committee for the Fair Broadcasting of Controversial Issues, supra*, does not support these requests. There is a crucial distinction to be made between the earlier and the present circumstances—namely, that the repeated Presidential appearances in 1970 (five in that instance), the basis for our ruling in *Committee for Fair Broadcasting*, dealt solely with the single issue of the Vietnam war. That fact was essential to our determination that an appropriate response was required. That is not the case here.[9] The Presidential appearances here in question (see paragraph 2, *supra*) did not deal solely with any single issue but rather ranged widely over a number of issues. The question, therefore, is whether on an overall basis the networks have afforded reasonable opportunity

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[9] The ABC interview with the President dealt substantially with the Indochina war; the NBC interview discussed the war only incidentally. The only broadcasts which presented solely the President's views on the war, were the April 7 address on CBS and NBC and the ABC March 22 interview. DNC does not specify any of the issues discussed by the President in the four broadcasts listed in footnote 3, but it is known that none of the broadcasts dealt solely with the Indochina war and none of them was uninterrupted, with the exception of the State of the Union message.

for the discussion of contrasting viewpoints on these varied issues. And in view of the overall programming of the three networks, it cannot be said that the "sum total" of any of the networks' efforts failed to satisfy the requirements of the fairness doctrine. (See *Committee for Fair Broadcasting, supra,* at p. 295.)

17. We should add that, in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views. We do not accept the RNC position that because ABC thought its overall programming was "fair and balanced" before it granted the DNC request for time to respond to the President's April 7 address, it could not be balanced after the request was granted. The fairness doctrine does not require that precisely "equal time" be given to contrasting views (*Committee for Fair Broadcasting, supra,* at p. 297); only that reasonable opportunity be afforded for their presentation in the licensee's overall programming. Under the doctrine, the licensee also is given great discretion in meeting its obligations. (*Fairness Primer,* 40 FCC 598 (1964)). Therefore, presentation by ABC of one additional broadcast on an issue which had been the subject of many other broadcasts occupying large amounts of time cannot be said, in and of itself, to have created an additional obligation to present still another broadcast on the opposite side. ABC clearly acted within its discretion.

18. As stated in footnote 9, DNC has not specified the issues that were discussed by the President in the broadcasts listed in footnote 3, and our ruling in *Allen C. Phelps, supra,* would preclude a finding against any network, absent a showing that the network did not provide a reasonable opportunity for the presentation of contrasting views on Administration policy on the particular issue. In short, there is no basis for further action on the specific programs involved. As to the general issues raised by the DNC, these

can of course be dealt with in the Commission's Notice of Inquiry referred to previously.

19. Finally, RNC has requested ABC's logs and other documents regarding the discussion of the Indochina war between February 8 and April 8, 1971. In support of this request, RNC states that it "has reports" that during this period, five persons expressed anti-Administration viewpoints on the Indochina war. Furnishing the material requested by RNC, particularly the logs, is not required by the Commission's rules, which set forth specific material which should be made available to the public. See Section 1.526 of the Commission's Rules and Regulations. As to "other documents," as the Commission stated in *Allen C. Phelps*, it would be unreasonable to require licensees to disprove allegations which lacks specific and detailed evidence of failure to comply with the fairness doctrine. RNC here has merely asserted that five persons expressed certain views on one program. It has offered no evidence that ABC failed to present contrasting views in other programs, and it is the overall programming of the licensee to which the fairness doctrine applies. Under the circumstances, we must deny RNC's request.

20. In view of the foregoing, the petitions of DNC and RNC ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Secretary

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is not yet reported. The opinion and order of the Federal Communications Commission (Pet. App. 43a-55a) is reported at 31 F.C.C. 2d 708.

JURISDICTION

The judgment of the court of appeals affirming the Commission's decision was entered on February 2,

1972. The petition for a writ of certiorari was filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Federal Communications Commission acted within its discretion by refusing, in the context of this case, to promulgate a new rule granting automatic equal response time to the opposition party for any broadcast appearance by the President as elected leader of the Nation.

2. Whether the court below erred in concluding that the Commission reasonably requires complaints in fairness cases to contain more than vague and general allegations of unfairness and that, under this standard, a complaint made by the Republican National Committee did not justify ordering ABC to produce programming documents and logs.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States and the perinent provisions of the Communications Act of 1934 are set forth in the petition for a writ of certiorari.

STATEMENT

On April 13 and 14, 1971, the Democratic National Committee (DNC) filed four separate complaints with the Commission against the three major television net-

works. DNC claimed that the networks had unreasonably refused to accede to its demands for free, equal time to respond to three specified broadcast appearances by President Nixon.

The first of the Presidential appearances at issue occurred on March 15, 1971, when NBC's Barbara Walters conducted a 48-minute interview with the President on the network's "Today" show. While the President gave his opinion on several public issues, the major portion of the interview dealt with his career and family life. On March 22, 1971, ABC aired a one-hour interview of the President by Howard K. Smith of the network staff; while the discussion focused principally on the war in Indo-China, election reform and revenue sharing were also mentioned. On April 7, 1971, all three networks simultaneously carried a Presidential address on the administration's programs and policies in Southeast Asia. (Pet. App. 4a-6a.)

CBS and NBC denied DNC's demands to reply to the latter address, but ABC provided one-half hour of free prime time for a response, which DNC utilized by broadcasting its program, "Indo-China: Another View," on April 22, 1971. However, ABC refused a request for equal time with respect to the March 22 interview with the President, and NBC refused to provide time for a DNC response to the "Today" show appearance by the President. (Pet. App. 5a-6a.)

In its complaints before the Commission, DNC argued that the Commission's ruling in *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707, applied to the broad-

casts in question. In *Zapple*, the Commission ruled that if a licensee sells time to one political party, it would be unreasonable to refuse to sell comparable time to the rival party. In the alternative, DNC maintained that "fairness" requires the networks to provide DNC with the time it demanded even if *Zapple* is not applicable.

The networks replied that the *Zapple* ruling is inapplicable and that the Commission's Fairness Doctrine merely requires broadcasters to provide a reasonable opportunity for the airing of views contrasting with those of the President and does not provide DNC with an automatic right to equal time to respond to any particular Presidential address. Each network asserted that it had complied with this Fairness Doctrine obligation with respect to the views expressed in the broadcasts and specifically indicated past actions and future plans with respect to the presentation of contrasting views. DNC then responded that, if the Fairness Doctrine is to be applied to Presidential broadcasts, an evidentiary hearing should be held to test the networks' assertions that Fairness Doctrine requirements have been satisfied. (Pet. App. 46a-50a.)

The Commission rejected DNC's claims, concluding that *Zapple* does not apply to broadcasts by the President as leader of the Nation, that the public interest does not require that the Commission adopt a new rule affording the opposition party an automatic right to respond to such broadcasts, and that DNC had not presented any substantial question of the networks'

compliance with the Fairness Doctrine that would require an evidentiary hearing. (Pet. App. 50a-55a.)

The Commission also denied the requests of the Republican National Committee (RNC), which had filed a complaint against ABC seeking broadcast time to respond to DNC's program of April 22 and an order that ABC be required to produce certain documents for inspection by RNC in the same proceeding (Pet. App. 51a-55a).

On petitions for review of the Commission's decision, the court of appeals affirmed. The court concluded that the Commission's policy with respect to Presidential broadcasts (Pet. App. 14a-28a) and certain procedural policies (Pet. App. 29a-40a) are reasonable exercises of agency discretion and do not violate the First Amendment, as DNC had claimed. In addition, the court held that the Commission had not been "arbitrary, whimsical or capricious" in the application of its policies and procedures in the instant case (Pet. App. 40a-41a).

ARGUMENT

The petition presents no question warranting review by this Court.[1] The court below merely upheld as reasonable certain established policies of the Com-

[1] The issues presented here are unrelated to the question of paid access to the broadcast forum for public issue "spot" announcements—the question presented in *Federal Communication Commission and United States* v. *Business Executives Move for Vietnam Peace and Democratic National Committee, et al.*, Nos. 71-863, 71-864, 71-865, 71-866.

mission with respect to fair coverage of controversial public issues, and determined that those policies had been rationally applied in this case. Finding no abuse of discretion, the court properly refused to substitute its judgment for that of the Commission with respect to the best policy to follow. *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279.

1. The Commission's Fairness Doctrine, as approved by Congress, 47 U.S.C. 315(a), and as sustained by this Court in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 386-392, generally requires licensees to present contrasting views on issues of public importance in order to serve the public's First Amendment interest in broadcasting. The Commission requires licensees to comply with the Fairness Doctrine in their treatment of controversial issues discussed by the President in his appearances on the air. *Letter to Republican National Committee*, 40 F.C.C. 625; *Letter to Blair Clark*, 11 F.C.C. 2d 511; *Committee for the Fair Broadcasting of Controversial Issues* (*Fair Committee*), 25 F.C.C. 2d 283, 294. Thus if the licensee allows the President to broadcast his views on public issues, reasonable opportunity must be afforded for the airing of significant opinions in opposition to his views.

DNC's argument against the Commission's policies in this respect is simply that whenever the President makes a broadcast appearance the public's right to receive contrasting viewpoints would be better served by providing the opposition party with free equal

response time instead of requiring licensees to present contrasting views in a format of the licensee's choosing. DNC asserts that the Commission's failure to adopt this suggested departure from the policy approved in Section 315 and *Red Lion* violates the First Amendment and the Communications Act.

DNC has offered only one reason for departing from the Fairness Doctrine in this area. DNC asserts that because of the importance of his office, only the President's voice will be heard if contrasting views are presented in formats of the licensee's choosing and therefore the public's interest in receiving contrasting viewpoints can be effectively satisfied only if DNC is provided with unfettered use of broadcast time to present contrasting viewpoints in the format of its choice.

The Commission's judgment that the continued application of the Fairness Doctrine to issues discussed in Presidential broadcasts better serves the public's First Amendment interest than would the adoption of DNC's suggested rule is based on a rational interpretation of the public interest. Treatment of such issues under the Fairness Doctrine, as the court below observed (Pet. App. 24a-25a, n. 10), serves "robust wide-open debate" and the goal of an informed electorate by allowing and encouraging "the discussion and presentation of controversial issues in various broadcast formats (*e.g.*, newscasts, interviews, documentaries)." *Fair Committee, supra,* 25 F.C.C. 2d at 292. Conversely, DNC's proposal of equal response time would tend to confine the discussion to

one format. Moreover, the court of appeals noted that some "groups are far more qualified to speak" than DNC on many issues discussed by the President (Pet. App. 36a). The opposition party is not always the principal source of opposition to—and may even agree with—a particular policy or viewpoint advocated by a President.

The court below also found that DNC's theory that only the President's voice is being heard is unfounded. The court stated (Pet. App. 36a-37a):

> Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. * * * Information indicative of all viewpoints is available merely for the seeking.

Based on its unsupported theory, DNC has argued that the Commission violated the Communications Act, which requires broadcasters to provide equal time with respect to candidates for public office. 47 U.S.C. 315. But the Commission has merely adhered to the congressionally approved, flexible approach of the Fairness Doctrine, rather than a general policy of equal time for specified individuals who may not always contribute to an informed electorate. Since DNC presented no "compelling indications" that this was an incorrect interpretation of the Communications Act, the court below properly affirmed the Commission's decision.[2] *Red Lion, supra*, 395 U.S. at 381;

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[2] DNC points out that the Commission has developed corollaries to the Fairness Doctrine in the past, but this does not

Udall v. *Tallman*, 380 U.S. 1, 16-17.

Finally, the record in this case belies DNC's assertion that the Fairness Doctrine's goal of an informed electorate has not been met with respect to Presidential appearances. In this case, the networks complied with the Fairness Doctrine and, in doing so, broadcast the views of DNC and its spokesmen, as well as others. Each of the networks indicated that substantial amounts of news, discussion, commentary and interview programs had been devoted to views opposing the President's, including those of several leading Democratic Senators and Representatives. In addition, ABC and NBC provided or scheduled free time for the specific use of DNC to air its views on public issues.

Thus, the court below properly held that the Commission's policy properly promotes First Amendment interests, that the Commission has followed a reasonable interpretation of the public interest standard of the Act, and that the Commission rationally applied its policy in this case.[3]

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advance its argument that the Commission has acted arbitrarily in this case. It merely demonstrates that the Commission may develop reasonable ancillary policies in the public interest. To this end, the Commission has instituted an in-depth study of the Fairness Doctrine to determine whether revisions to existing policies or new policies could appropriately be adopted to further the goal of robust debate on public issues. *Notice of Inquiry in Docket 19260*, 30 F.C.C. 2d 26.

[3] DNC suggests that the court below refused to require the Commission to adopt DNC's proposed rule because the court feared that this would cause the President to restrict his use

2. DNC also contends that the Commission should adopt different procedures for processing Fairness Doctrine complaints.

The Commission receives a great number and variety of complaints that, in diverse ways, question some broadcaster's compliance with the Fairness Doctrine.[4] The basic procedures for dealing with these complaints are described at 29 Fed. Reg. 10415, 10416. The complainant is expected "to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station has afforded, or has plans to afford an opportunity for the presentation of contrasting viewpoints." *Id.* If the complaint indicates that further inquiry is warranted the Commission will request the licensee's comments. It may then dispose of the matter on the basis of the submission or may require additional information from the licensee.

DNC urged in its complaint that if the Fairness Doctrine, instead of an automatic right of response

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of television (Pet. 14-15). But DNC had the burden to show that the Commission's policy was irrational; and the court had no obligation to show that DNC's proposal was unfeasible. Moreover, as explained above, the Commission had other sound reasons for rejecting the proposed rule.

[4] The Commission received 1736 complaints alleging fairness doctrine violations in fiscal 1970. 36th Annual Report, p. 62.

by the opposition party, is to be applied to issues discussed in Presidential broadcasts, then the Commission should conduct a full-scale evidentiary hearing to determine how much time each network devoted to presenting views supporting or opposing the President on each issue discussed, the format in which the views were presented, the manner in which opposition spokesmen were selected, the impact of Presidential and other appearances on viewers, and other questions that DNC considered relevant to the inquiry (Pet. App. 38a-39a).

DNC's petition indicates that it is no longer contending that the Commission erred in denying its own request for an evidentiary hearing. Instead it asks this Court to consider whether the Commission erred in denying the Republican National Committee's request that the American Broadcasting Company be compelled to produce certain documents and to consider whether the Commission's general requirement that fairness complainants present "detailed and specific evidence of failure to comply with the requirements" of the Fairness Doctrine imposes an excessive burden on fairness complainants generally.[5] The petition does not indicate how either ruling af-

[5] DNC did not claim before the Commission that the specific evidence requirement imposed an unreasonable "burden of proof." While reaching the merits of this contention, the court below first properly ruled that the claim was procedurally defective under 47 U.S.C. 405, which precludes a reviewing court from considering an argument not made before the Commission. *Hansen* v. *Federal Communications Commission*, 413 F.2d 374 (C.A.D.C.).

fected DNC's ability to present any Fairness Doctrine complaint it may have had. However, even if it is assumed that this case does "present" those questions, DNC's contentions do not warrant the Court's consideration.

The ruling on the RNC request represents a reasonable application of the Commission's policy of tailoring the scope of the fairness inquiry to the nature of the complaint. RNC questioned whether ABC had taken non-news programming into consideration in concluding that its presentation of views on the Vietnam war was balanced and requested documents for the purpose of determining the accuracy of ABC's position. The Fairness Doctrine does not require mathematical balance; it requires that a licensee provide reasonable opportunities for the presentation of contrasting views. RNC did not allege that ABC had failed to present contrasting views; other documents submitted to the Commission demonstrated that ABC had done so. The Commission concluded that there was no reason to require production of documents in those circumstances and the court of appeals, in affirming the Commission's decision, stated that it was "at a loss" to find any reason why ABC should be compelled to do so (Pet. App. 31a).

DNC incorrectly asserts that the Commission's policy of requiring complainants to produce specific evidence of noncompliance with the Fairness Doctrine frustrates First Amendment interests. That policy stems from the Commission's commitment to foster wide-open debate on public issues. To this end, the

Commission encourages licensees to editorialize and requires that they cover significant opinions on public issues in a fair manner. This duty is part of the licensees' obligation to act in the public interest, a condition of a license to broadcast, and good faith compliance is consequently required. With these considerations in mind, the Commission has refused to require licensees to engage in laborious searches and collections of documents to prove their adherence to the doctrine when a complainant has done nothing more than allege general unfairness. *Robert G. Ryan*, 25 F.C.C. 2d 884, 885; *Allen C. Phelps*, 21 F.C.C. 2d 12, 13; *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600, 29 Fed. Reg. 10415, 10416. Such time-consuming searches would deter proper handling of day-to-day broadcast operations and would not be conducive to uninhibited debate. Consequently, the Commission has reasonably required specific evidence of unfairness from a complainant before it will consider ordering broadcasters to produce documented proof of fair coverage. *Hale* v. *Federal Communications Commission*, 425 F.2d 556, 559 (C.A.D.C.); cf. *Healey* v. *Federal Communications Commission*, No. 24,630, C.A.D.C., decided March 3, 1972, slip op. p. 9.

DNC's assumption that the specific evidence requirement is an onerous burden for complainants with a *bona fide* complaint is unfounded. DNC may be troubled that establishing the degree of balance on issues that do receive substantial coverage would

be difficult, but, as previously noted, the Fairness Doctrine does not require mathematical balance. Extensive monitoring would not be required to present a specific complaint that will enable the licensee to respond to it.

The Fairness Doctrine procedure presents no absolute bar to requiring broadcasters to produce program documentation. The Commission's rulings on the type of evidence that will necessitate production of programming documents are necessarily based upon the nature of the complaint in the particular case. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. at 599-600, 29 Fed. Reg. at 10416.

Moreover, the processing of *ad hoc* fairness complaints received between license renewals is not the only, or the principal, means of assuring licensee compliance with the Fairness Doctrine and other public interest requirements. More extensive evaluation of the licensee's performance occurs in determining whether a license should be renewed.[6]

In sum, DNC seeks review of the decision below in the hope that this Court will substitute the policies

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[6] If a substantial question of compliance with the Fairness Doctrine exists at the time of a renewal application, public participation and an evidentiary hearing may be required. *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 359 F.2d 994 (C.A. D.C.). The renewal applicant has the burden of proof in establishing that renewal of the license will be in the public interest. *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 425 F.2d 543 (C.A.D.C.).

of DNC for those of the Commission. However, as the court below held, the Commission's policies are neither unreasonable nor in contravention of statutory purpose or constitutional command. Accordingly, the Commission's exercise of its responsibilities here was correctly upheld. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WALKER B. COMEGYS,
Acting Assistant Attorney General.

CARL D. LAWSON,
LEE A. RAU,
Attorneys.

JOHN W. PETTIT,
General Counsel,

JOSEPH A. MARINO,
Associate General Counsel,

CHARLES A. ZIELINSKI,
Counsel,
Federal Communications Commission.

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IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-1055

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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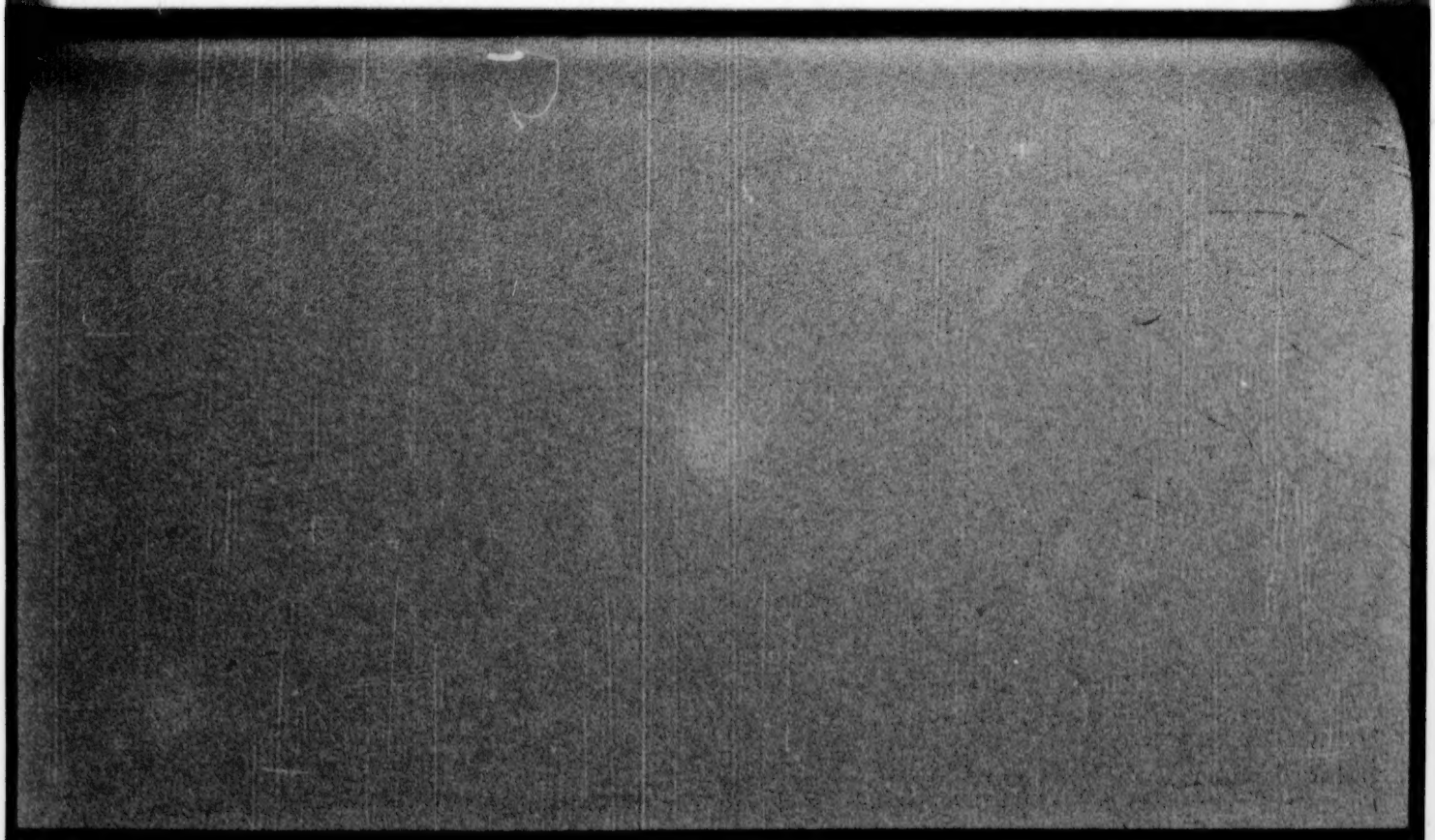
BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

JAMES A. MCKENNA, JR.
CARL R. RAMEY
Attorneys for Respondent American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

WILSON - EPES PRINTING CO., INC. - NE 7-6005 - WASHINGTON, D. C. 20001



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Case No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the Democratic National Committee. The *Memorandum Opinion and Order* of the Federal Communications Commission is reported at 31 F.C.C. 2d 708 (1971) and is reproduced in Appendix C to the petition filed by the Democratic National Committee.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on February 2, 1971. DNC Pet., App. B, p. 42a. The petition for a writ of certiorari was filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Federal Communications Commission[1] acted within its discretion by declining, in an *ad hoc* context, to promulgate a new rule which would pre-designate the opposition political party as the recipient of an automatic and equal time right of reply to broadcast appearances by the President of the United States?

2. Whether the court below erred in concluding that it is reasonable for the Commission to require that complainants in fairness doctrine cases assert more than vague and general allegations of unfairness and that, pursuant to this standard, the complaint of the Republican National Committee did not justify the correlative request that ABC be ordered to produce programming documents and logs?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional and statutory provisions which ABC believes are involved include the First Amendment to the Constitution and Section 315(a) of the Communications Act of 1934. These provisions are set forth in the petition of the Democratic National Committee.

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[1] Hereinafter the "Commission" or the "FCC."

STATEMENT

Respondent American Broadcasting Companies, Inc. (hereinafter "ABC"), itself or through its subsidiaries, is the licensee of radio and television stations and operates radio and television networks. As such, ABC must continually make determinations as to what subject matter is to be transmitted over its facilities, including specifically news and public affairs programming. It is in the performance of this role that ABC presents important addresses of the President of the United States and invites the President and other national leaders to periodically appear in less formal discussion-type formats.

In this general context, the Democratic National Committee (hereinafter "DNC") requested the Commission to order ABC and the two other national television networks (CBS and NBC) to provide the DNC with free prime time programming for the presentation of views in opposition to those assertedly voiced during certain radio and television appearances of President Richard M. Nixon.[2] ABC and NBC had declined to accede to DNC's demand for free time to answer, respectively, a March 22, 1971, one-hour broadcast on ABC radio and television networks entitled "A Conversation with the President" and an interview with the President on the NBC "Today" show on March 15, 1971. In addition, both CBS and NBC denied DNC's request for time to answer a 20 minute Presidential address which was carried by all three networks on April 7, 1971, concerning the situation in Southeast Asia.

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[2] The various broadcast appearances involving the President are described in the lower court's decision. See DNC Pet., App. A, pp. 4a-5a. Two of the programs were interviews of the President by a single network correspondent (one on ABC and the other on NBC); the third program was a Presidential address on the Indochina War issue and was carried by all three networks.

ABC, however, determined that it would be appropriate to afford Democratic Party spokesmen an opportunity to discuss the Indochina War issue. Accordingly, ABC offered 30 minutes in prime time for the presentation of views in a format to be agreed upon in advance by DNC and ABC, and this offer was effectuated on April 22, 1971, when six Democratic Senators appeared on the ABC Television Network in a program entitled "Indochina— Another View."

The several DNC complaints filed with the Commission on April 13 and 14, 1971, rather than attempting to establish a violation of the Commission's general fairness doctrine, instead reiterated a pending request of the DNC for rulemaking in an outstanding Commission proceeding,[3] and claimed that notwithstanding the achievement of fairness and overall program coverage on the issues involved, the DNC was entitled to a specific right of reply to each individual Presidential appearance. In addition, DNC urged that past Commission holdings established that it should be given equal time to respond.[4]

In reply, each of the networks asserted that they were not *required* to provide specific response time to DNC, that the Presidential appearances in question were governed by the general fairness doctrine requirement that opportunity be provided for the presentation of contrasting viewpoints on controversial issues discussed by the

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[3] *In re Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 18859, 23 F.C.C.2d 27 (1970).

[4] The rulings relied upon DNC were *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970) and *Republican National Committee*, 25 F.C.C. 2d 739 (1970) *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971). In these cases the Commission had applied a "quasi-equal opportunities" approach to some broadcasts by political parties—i.e., if a station sells or gives time to one political party, it should sell or give comparable time to the rival party. Section 315(a) of the Communications Act, of course, only provides that "equal opportunities" be extended to opposing political *candidates*.

President and that, in this sense, fairness had been achieved.[5] The networks also stressed that the automatic right to reply to Presidential appearances proposed by DNC was not compelled by existing law—rather the present statutory framework *pre-designates* the counter spokesman on public issues only in the situation of bona fide political candidates.[6]

ABC stated that besides the April 22 broadcast by six Democratic spokesmen, views in contrast to those expressed by the President were given by Senator Mansfield after the State of the Union Address of January 22, 1971. In addition, ABC pointed out that in the immediately preceding period alone—from January to April, 1971—six Democratic spokesmen appeared on its public affairs program "Issues and Answers" and opposed the views of the President, whereas two persons appeared who favored his views. ABC also indicated that it had devoted significant time to views favoring and in contrast to those of the Administration in newscasts during the relevant period and in such programs as the "Dick Cavett Show".

The Commission held that such past decisions as *Letter to Nicholas Zapple, supra*, merely established the general proposition that, during election campaigns, it would be unreasonable for a licensee to refuse time to a political party or supporters of a political candidate after a licensee had given time to the supporters of an opposing candidate. The Commission refused to extend this ruling to broadcasts involving the President, determining to continue to apply the general principles of the fairness doctrine to Presidential appearances rather than carving out

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[5] In this regard, showings were made that contrasting views had been presented as to the issues raised in the three specific Presidential appearances in question as well as with respect to other recent appearances by the President.

[6] 47 U.S.C. § 315(a).

a new corollary which would lodge an automatic right of reply with the opposition political party. The Commission further found that the network companies had not violated their fairness doctrine obligation to present contrasting views to those expressed by the President and that, accordingly, the evidentiary hearing requested by DNC was unnecessary.

In the same opinion, the Commission denied a related complaint filed by the Republican National Committee (hereinafter "RNC") directed against ABC. This complaint stemmed from ABC's decision not to accede to RNC's demand for free broadcast time to respond to ABC's April 22 program featuring six Democratic Senators.[7] Furthermore, without any documentation of its own, RNC claimed that, in deciding to present the April 22 program involving six Democratic Senators, ABC had not given consideration to views presented by guests on ABC's late evening "Dick Cavett Show". Thus, RNC urged the Commission to compel ABC to provide "any logs and other documents" demonstrating "the time used on ABC during the period February 8 to April 8, 1971, for the discussion of various viewpoints on the Indochina issue." DNC Pet., App. A, p. 49a. On this point, the Commission held that ABC should not be required to provide detailed documentation of its public issue program-

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[7] As to this fairness doctrine aspect of the RNC complaint—a matter which is not covered by the DNC petition—the Commission ruled that, in light of the fact that a reasonable opportunity had been provided for the presentation of contrasting views on the Vietnam war, ABC had met its fairness obligation and was not compelled to provide the RNC, *qua* political party, with time to specifically respond to what RNC characterized as a previous partisan presentation of the DNC. DNC Pet., App. C, p. 54a. The lower court similarly refused "to sanction the commencement of an unending circle" of political party appearances, remarking that "[s]hould we grant RNC an opportunity to respond to DNC we would embark upon a course of request after request." DNC Pet., App. A, p. 23a.

ming in response to a bare, unsupported allegation of unfairness. DNC Pet., App. A, p. 55a.

On petitions for review, the court of appeals unanimously affirmed the Commission's ruling. The Commission's application of its fairness doctrine to Presidential appearances on the broadcast media (DNC Pet., App. A, pp. 14a-28a), as well as certain procedural policies generally applicable to fairness doctrine situations (DNC Pet., App. A, pp. 29a-40a), were found to be reasonable exercises of agency discretion which did not violate the First Amendment. Further, the court held that the Commission's findings were fully supportable, within its statutory authority, and not "arbitrary, whimsical, or capricious." DNC Pet., App. A, p. 41a.

ARGUMENT

In attempting to persuade this Court to grant plenary review of the lower court decision, DNC has merely muddied an otherwise unambiguous path. Stripped to its essence, the DNC petition is a strained effort to surround the lower court opinion with a heightened significance that is unfounded on the record before both the Commission and the court of appeals.

Rather than the artificial dimensions DNC would draw, the lower court opinion merely affirms long-held Commission policies concerning the coverage of controversial public issues, and determines that those policies had been rationally and fairly applied in this particular case. Accordingly, absent any finding of abuse of discretion, the court appropriately declined to substitute its judgment for that of the agency specifically created by Congress and entrusted with the decisional responsibility to fashion such policies. See *National Broadcasting Co.* v. *FCC*, 319 U.S. 190 (1943); *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Particularly indicative of the shallowness of the questions presented by the DNC petition is the apparent effort to conceptually link this case with a pending consolidated proceeding before this Court.[8] Unlike here, however, that proceeding involves an entirely new interpretation and extension of the First Amendment as applied to broadcasting. This case, in contrast, represents merely the dispute of a private party as to how *existing* policies in one particular circumstance (Presidential media appearances) should be applied. Moreover, the issues that DNC raises are irrelevant to the question of an affirmative First Amendment right of paid access to the broadcast media for public issue announcements during broadcast advertising time—the issue at stake in the cited pending cases.

The Petitioner also casts the lower court opinion in an aura of undue significance by associating the unique qualities and responsibilities of the Office of the Presidency with what it asserts is the special effectiveness of the electronic media in the political process. While there is little doubt of the pervasive qualities of radio and television as disseminators of information, DNC's assertions as to the particular degree of interrelationship between the attributes of the Office of the Presidency and the effectiveness of the media are mere speculation. Surely the Office of the Presidency is unique in our political structure,[9] but a recognition of this fact may well diminish rather than enhance DNC's position that broadcast appearances by the *elected* leader of the nation

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[8] See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71-863, consolidated with *FCC* v. *Business Executives Move for Vietnam Peace*, No. 71-864; *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives Move for Vietnam Peace*, No. 71-865; and *American Broadcasting Companies, Inc.* v. *Democratic National Committee*, No. 71-866.

[9] See, *e.g.*, P. Herring, *Presidential Leadership* (1940) p. 12; G. McConnel, *The Modern Presidency* (1967) pp. 15, 35.

should be automatically "balanced" by the appearance of the opposition political party. In sum, simple conjecture as to the effectiveness of the broadcast medium in the formation of public opinion is obviously an inadequate basis on which to proceed to initiate new requirements with respect to the use of that medium by the nation's Chief Executive.[10]

I. There Is No Significant Question That Would Warrant Review By This Court.

It is noteworthy that not only the Commission and the court below, but the parties, including DNC, apparently agree on the First Amendment principle involved. For instance, DNC stresses that the relevant First Amendment goal in this context is to produce an informed public and to preserve broadcasting as a forum for robust, uninhibited and wide-open debate of public issues. DNC Pet., pp. 13-14. The real dispute framed, therefore, merely centers on DNC's claim as to how this objective should be interpreted and implemented.

The lower court held that public discussion would be inhibited if Presidential broadcast appearances were all pre-designated—irrespective of the content and nature of the appearances—for an equivalent response by the opposition political party, since the President would thereby restrict his use of television. DNC's assertion that this is an "unsubstantiated fear that cannot justify abridgement of First Amendment rights" (DNC Pet., p. 15) is totally misplaced. Rather, a plain reading of the lower court's opinion is that DNC's proposal to create an automatic right of reply to all Presidential appear-

[10] For a view that contemporary advocates of expanded and individualized media access may be misled in assuming too great a power of television to develop political consciousness, see Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 769-71 (1972).

ances would indeed abridge First Amendment interests. In DNC's twisted view of the lower court decision, however, it is said that the ultimate result means that only the President's voice and views will be heard on political issues and that the public will be denied the exposure to competing viewpoints essential to an informed electorate. DNC Pet., p. 15. This is totally inaccurate since the Commission and the lower court clearly affirmed the applicability of the fairness doctrine to Presidential appearances to insure that contrasting views to those of the President are presented on the broadcast media.

In essence, DNC really is left to suggest that it, as the opposition political party, does not obtain the broadcast exposure that *it* determines necessary and appropriate. In other words, the real question at issue is one of degree in which DNC asserts that—irrespective of the exposure of Democratic spokesmen on an appropriate rather than an automatic basis and the full and fair treatment of issues discussed in Presidential appearances—it is entitled to an additional special organizational right that is fully comparable to the President's broadcast media exposure.

In DNC's opinion, review is warranted because the court below and the Commission have applied the fairness doctrine so as to "defeat the doctrine's role of assuring that the listeners and viewers will be adequately exposed to contrasting viewpoints on controversial issues of public importance." (DNC Pet., p. 16). In point of fact, the Commission and the court below have construed the fairness doctrine in a manner that is fully consistent with this Court's interpretation of the First Amendment purpose of that doctrine in its leading *Red Lion*[11] case. DNC simply fails to acknowledge that the basis for the Commission's ruling and the court's decision below was

[11] *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969).

that acceptance of DNC's position would result in a degradation of the vital First Amendment interests underlying the fairness doctrine and would frustrate the objective of insuring that listeners and viewers are adequately exposed to all contrasting viewpoints on significant issues of public importance.

It is undisputed that the fairness doctrine is fully applicable to the discussion of controversial issues during Presidential appearances.[12] Accordingly, Presidential appearances on broadcast stations involving the discussion of public issues, under present procedures, invoke an obligation on the part of such licensees to present the viewpoints of contrasting spokesmen.

In the traditional operation of the fairness doctrine, however, this has allowed licensee discretion in determinning the schedule and format of such presentations—including, particularly, flexibility in selecting the appropriate spokesmen for such views rather than their predesignation.[13] DNC suggests that the court below refused to "come to grips" with its central argument and was "reluctant to disturb the unchecked discretion" lodged with broadcasters under the fairness doctrine. DNC Pet., pp. 18-19. This sort of characterization simply will not comport with the plain language of the court of appeals decision. The court fully comprehended the nature of DNC's request and, more importantly, the im-

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[12] See *Letter to Blair Clark*, 11 F.C.C. 2d 511 (1968); *aff'd sub nom. McCarthy* v. *FCC*, 390 F. 2d 471 (D.C. Cir. 1968); *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970); *Republican National Committee*, 25 F.C.C. 2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System, Inc.* v. *FCC*, 454 F. 2d 1081 (D.C. Cir. 1971).

[13] For instance, in this case ABC demonstrated that it had achieved fairness through regular newscasts, regularly scheduled public affairs programming and by means of special events public affairs programming—including a variety of contrasting spokesmen.

plications of its effectuation. Correctly applying the rationale of this Court's decision in *Red Lion*, the court of appeals found that to implement the abstract proposal of DNC would constrict rather than promote the public's First Amendment right to hear views that contrast with those of the President on important public issues. As the court noted, treatment of Presidential broadcast appearances under the fairness doctrine generates "robust, wide-open debate" and the goal of an informed electorate by allowing and encouraging "the discussion and presentation of controversial issues in various broadcast formats (e.g., newscasts, interviews, documentaries)." [14]

In contrast, DNC's proposal of an automatic equal time response to Presidential appearances would necessarily confine the discussion to one format and one counter spokesman. In the lower court's view, the basic principle underlying the fairness doctrine and its treatment in *Red Lion* to insure that the public is adequately informed could be achieved by more appropriate means:

> "At times the President speaks to crucial problems to which . . . groups [other than DNC] are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States. If DNC were correct in their contentions, this illusory First Amendment right would extend right of response to addresses by state governors and city mayors." [15]

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[14] See DNC Pet., App. A, p. 24a, quoting from *Committee for the Fair Broadcasting of Controversial Issues, supra*, 25 F.C.C. 2d at 292.

[15] DNC Pet., App. A, p. 36a.

Consequently, both the Commission and the court of appeals recognized that DNC's proposal would not necessarily advance the goal of an informed electorate. DNC has merely suggested an alternative policy based on the debatable rationale that the President, by virtue of his position, is capable of dominating the broadcast media at will and thereby shaping and limiting the content and focus of national debate on significant public issues. Rather than skirting this issue as DNC suggests, the court of appeals met the problem head on:

> "As to the contention that without this automatic right only the voice of the President is heard, clearly we can only say that while this may be a persuasive debate argument, we question its validity here. Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation, the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking. We see no need for supplementation based on some theoretical right in the First Amendment which at best has gone undefined in this litigation.[16]

Ignoring this perspective, DNC continues to insist that by the use of the televised address the President is able to obtain "instant concensus on his programs and policies" and there is seldom a "single focal point of opposition." (DNC Pet., p. 17). That the President is able to achieve an "instant concensus" would probably come as a surprise to *any* Administration and is surely pure

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[16] DNC Pet., App. A, pp. 36(a)-37(a).

supposition on DNC's part as to either the impact of the media or the persuasiveness of the Chief Executive.[17]

In sum, the Commission and the court below have merely adhered to the system of broadcast regulation approved by Congress, implemented by the Commission through such policy mechanisms as the fairness doctrine, and approved by this court in *Red Lion*. That system turns on a concept of public stewardship whereby individual licensees are obligated to inform the public of contrasting views on significant public *issues* in a variety of formats and by multiple speakers rather than pursuant to an equal time approach which would designate a single opposing spokesman. Moreover, in this particular instance the record reflects that this procedure of devoting substantial amounts of news discussion, commentary and interview programs to views contrasting those of the President was followed. In addition, ABC specifically provided spokesmen from the Democratic Party with free time for their use to air views contrasting those of the President on the Indochina War issue. Consequently, DNC seeks review of a decision which is fully consistent with prior interpretations of the fairness doctrine and the teachings of this Court in *Red Lion* as to the application of the First Amendment to broadcasting. As the court of appeals noted, "DNC asks [the court] to give birth to a new corollary [to the fairness doctrine]. We are not the body to pass on such a request." [18] In conclusion, the court emphasized that there

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[17] *See generally*, J. Klapper, *The Effects of Mass Communications* (1960); Hovland, *Effects of the Mass Media of Communication*, in MASS MEDIA AND COMMUNICATION 447-82 (C. Steinberg ed. 1966).

[18] DNC Pet., App. A, p. 41a. In so ruling, the court, of course, followed a long line of cases holding that a court's purpose on review is to determine whether the agency order is unreasonable or in contravention of statutory purpose and not to substitute its discretion for that of the administrative agency. See *American Telephone and Telegraph* v. *U.S.*, 299 U.S. 232, 236 (1936). In

are more appropriate forums for the advocacy of completely new standards.[19]

II. Commission Procedures for Processing Fairness Doctrine Complaints Foster Rather Than Infringe First Amendment Rights.

DNC asserts that the court of appeals approved certain procedural standards which would deny fairness doctrine complainants "procedural fairness". These include (1) the court's acceptance, as reasonable, the Commission's standard that complainants establish "detailed and specific evidence of failure to comply with the requirements" of the fairness doctrine and (2) the court's affirmation of the Commission's refusal to order ABC to make available its logs and other programming materials for a determination of whether a "requisite balance" in public affairs programming had been achieved.[20]

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short, where Congress and the responsible agency have struck one balance rather than another this Court has repeatedly cautioned against the temptation of judges to become "super legislatures" whether under the aegis of the Constitution or through conventional judicial review. *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952); *62 Cases of Jam* v. *U.S.*, 340 U.S. 593, 600 (1951). More specifically perhaps, as this Court noted in *Red Lion, supra*, 395 U.S. at 381 (1969), the FCC's interpretation of the fairness doctrine is entitled to "great weight" and should be followed unless there are "compelling" indications that it is wrong.

[19] DNC Pet., App. A, p. 41a. As illustrative of the court's point, Congress has several times revised the Communications Act of 1934 to give statutory recognition to the fairness doctrine, amend the equal time requirement, and for other objectives. See, *e.g.*, 66 Stat. 717 (1952 amendments); 73 Stat. 557 (1959 amendments); and 86 Stat. 3 (1972 amendments). Equally pertinent, the very subject matter of the DNC's concern is currently being considered as part of an outstanding Commission proceeding. *In re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 F.C.C. 2d 26, 33-34 (1971).

[20] DNC Pet., pp. 19-20. Significantly, although the court's ruling was limited to an *ad hoc* request for documentation as to ABC,

DNC's procedural contentions similarly place it in the bare posture of merely asserting that the Commission should be judicially directed to drastically modify existing procedures to conform with DNC's view that a divergent approach is "more appropriate". As the court below found, the Commission has long maintained a policy of refusing to require licensees, in the normal course, to engage in laborious searches and collections of documents to affirmatively prove adherence to the fairness doctrine when a complainant has done no more than allege general unfairness.[21]

Based on decades of experience, the Commission has adopted the view, which was affirmed by the court below, that such time-consuming searches would deter the proper handling of day-to-day broadcast operations, could be subject to abuse and would generally not be conducive to uninhibited debate. For this reason, the Commission

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DNC now appears to claim that the court failed to actually fashion a rule of general applicability in this regard. Before the lower court, DNC's procedural contentions were restricted to the following aspects: (1) the timeliness of the Commission's decision, (2) the burden of proof on fairness doctrine complainants, and (3) the Commission's failure to hold an evidentiary hearing on DNC's claims. See DNC Pet., App. A, p. 37(a). Thus, the present contention regarding the need for routine production of "logs and other programming materials" to constantly demonstrate fairness was not specifically raised below by the DNC. Rather DNC merely expressed support of an *ad hoc* request of the Republican National Committee (RNC) to order ABC to make "logs and other documents" available to satisfy RNC's speculation as to whether ABC had considered certain "non-news type" programming in determining whether fairness had been achieved on a particular issue. Moreover, RNC has not sought review of the lower court's decision. Indeed, based on the representation that ABC had indeed considered the "Dick Cavett Show" (See page 6, *supra*) in determining fairness, counsel for RNC verbally advised the court of appeals at oral argument that RNC was no longer pressing this issue.

[21] *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969); *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600 (1964); *Robert G. Ryan*, 25 F.C.C. 2d 884, 885 (1970).

has implemented certain minimal and reasonable standards which the complainant in a fairness doctrine context must normally meet before the agency will act upon such a complaint.[22] For example, the Commission has merely determined that it will not act upon the merits of fairness complaints absent some showing that the licensee involved acted unfairly in covering a particular issue.

In this specific case, the court found that it was not only appropriate to place the *initial* burden in such instances with the complainant rather than the licensee, but that DNC had failed to meet that burden in this proceeding. DNC Pet., App. A, p. 38a.[23] In this Court, DNC goes beyond the general burden of proof issue and now argues that in being denied regular and general access to certain undefined programming materials of broadcast licensees, fairness doctrine complainants are refused "the only available source of 'specific and detailed evidence' of a broadcaster's coverage of controversial issues of public importance," DNC Pet., p. 20.[24] During the con-

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[22] See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, supra*, 40 F.C.C. at 600. There are, however, no formal rules that inflexibly govern such situations.

[23] It should be noted that the court below ruled on this point even though it initially found that DNC had failed to preserve the burden of proof issue for review because it had not raised the claim before the Commission. Pet. App. A, pp. 37(a)-38(a). This procedural deficiency is, of course, compounded by the fact that the further claim for logs and other programming documentation was a claim in the court below unique to the RNC, not the DNC.

[24] DNC's speculation that monitoring of the programming of the three networks would be an insurmountable undertaking is greatly misleading. DNC Pet., p. 21. First of all, the impression that continual monitoring on all issues and as to all programs (including the vast bulk of entertainment, sports and similar programming) is necessary is simply spurious. Generally, any monitoring that was necessary could be limited to regularly scheduled news and public affairs programming. Furthermore, experience dictates that others

siderable period the Commission has administered the fairness doctrine it has processed thousands of legitimate complaints which have been successfully raised without resort to "logs and program material". Furthermore, the Commission's experience simply will not support the additional assertion that the effect of the court's ruling on these procedural matters—which does no more than affirm long-standing practices—will be to discourage fairness doctrine complaints by those wishing to present their views on controversial issues. Certainly the recent trend in fairness complaints has been toward a steady escalation and there is no discernible evidence that rejections of fairness complaints on this ground have correspondingly increased.[25]

It is also important to emphasize that the fairness doctrine procedures utilized by the Commission by no means represent an absolute prohibition against requesting the production of program documentation by broadcasters in certain instances. In other words, although on infrequent occasions and in particular circumstances the Commission may request such support materials,[26] it

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have been successful in monitoring the efforts of broadcasters—for fairness doctrine purposes, as well as for challenges to license renewals and other objectives. For instance, a recent survey of the contemporary scene remarks that "[l]icense challengers and civic action groups *monitoring* radio and television, rarities in the past, became commonplace." Alfred I. duPont—COLUMBIA UNIVERSITY SURVEY OF BROADCAST JOURNALISM 1970-1971, p. 4 (1971).

[25] For example, whereas complaints alleging fairness doctrine violations numbered 409 in 1962, the yearly total had increased to 1,736 in 1970. See 28TH ANNUAL FCC REPORT (1962) pp. 44, 52 and 36TH ANNUAL FCC REPORT (1970) p. 62.

[26] See, *e.g.*, *In re Complaint of Democratic National Committee Against NBC, CBS and ABC*, 33 F.C.C. 2d 631, 633-35 (1972), on appeal to the United States Court of Appeals for the District of Columbia Circuit, *Democratic National Committee* v. *FCC*, No. 72-1314.

has more commonly followed the general procedure of not requiring such documentation since to do so would forestall rather than foster the robust debate that the fairness doctrine attempts to achieve. Consequently, for most purposes—upon a threshold finding that a fairness doctrine complainant has satisfied the minimal pleading standards [27]—the Commission has found it adequate and desirable to process legitimate fairness complaints on the basis of the licensee's written representation as to his treatment of the issue in question, and has not generally required the further submission of such background materials as transcripts, tapes, logs, etc.

The DNC petition is, therefore, characterized by a feeble attempt to cloak the lower court decision in artificial significance and to effectuate a substitution of its own policies for those of the Commission. However, as the court below found, the Commission's policies are neither unreasonable nor in contravention of statutory purpose. They are of long-standing origin, based on a statutory mandate and represent an affirmation rather than a departure from the First Amendment principles applicable to broadcasting articulated by this court in *Red Lion*.

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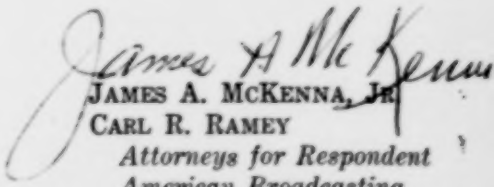
[27] "Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints." *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600 (1964). See *Hale* v. *FCC*, 425 F.2d 556, 559 (D.C. Cir. 1970); *Cf. Dorothy Healey* v. *FCC*, D.C. Cir. No. 24,630, decided March 3, 1972, *Slip Op.*, p. 9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,



JAMES A. MCKENNA, JR.
CARL R. RAMEY
Attorneys for Respondent American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

Of Counsel:

CORYDON B. DUNHAM
Vice President and General Counsel
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, N. Y. 10020

HOWARD MONDERER
Washington Attorney
NATIONAL BROADCASTING COMPANY, INC.
1800 K Street, N.W.
Washington, D.C. 20006

LAWRENCE J. MCKAY
DONALD J. MULVIHILL
FLOYD ABRAMS
LAURENCE T. SORKIN
CAHILL, GORDON, SONNETT, REINDEL & OHL
1819 H Street, N.W.
Washington, D.C. 20006
Attorneys for Intervenor National Broadcasting Company, Inc.

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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BRIEF OF INTERVENOR NATIONAL BROADCASTING COMPANY, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported yet. It is reprinted as Appendix A (pp. 1a-42a) of the petition for certiorari. The opinion of the Federal Communications Commission, which was affirmed by the Court of Appeals, is reported at 31 F.C.C. 2d 708 (1971). It is reprinted as Appendix C (pp. 43a-55a) of the petition for certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1972. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the fairness doctrine does not require that a licensee make equal time available to the opposition party every time the President appears on television?

2. Whether the Court of Appeals correctly held that petitioner was not entitled to raise its burden of proof claim for the first time on appeal?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 315 of the Communications Act of 1934 (47 U.S.C. § 315) provides in pertinent part as follows:

> "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed

upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views of public importance."

STATEMENT OF THE CASE

This case involves four fairness doctrine complaints filed by the Democratic National Committee (hereinafter "DNC"), in which DNC, claiming that as the "opposition party" it was entitled to an automatic right to respond to Presidential television appearances, sought free time to respond to the following:

1. An NBC interview of the President by Barbara Walters on the March 15, 1971 "Today" program.

2. An ABC interview of the President by Howard K. Smith on March 22, 1971.*

* The ABC interview is described more fully in the briefs for the FCC and ABC.

3. An April 7, 1971 Presidential speech on the Indochina war. The speech was carried simultaneously on NBC, CBS and ABC.

At the time of these broadcasts, the President had not yet announced that he would be a candidate for reelection in 1972, and thus the "equal opportunities" requirement of Section 315 of the Communications Act did not apply. See *McCarthy* v. *FCC*, 390 F.2d 471 (D.C. Cir. 1968).

The March 15, 1971 "Today" Program

On March 15, 1971, President Nixon was interviewed by Barbara Walters on the NBC morning "Today" program. The interview dealt mainly with the President's views on the role of women, Mrs. Nixon's influence on his career, the role of other First Ladies, women reporters, women in government, and the American family.

On March 30, 1971, NBC denied DNC's request for "equal time" on the "Today" program to respond to the President (J.A. 1)*, and DNC filed a complaint with the Federal Communications Commission (hereinafter "FCC"). The gist of the complaint was not that NBC had failed to provide balanced coverage on any particular issue, such as the economy or the Indochina war, but rather that "[t]he personality of Richard Nixon is, in practical and psychological terms, no less a political issue than his views on the economy or the war in Vietnam." (J.A. 7) In a marked departure from traditional fairness complaints alleging lack of balanced coverage with respect to a particular issue, DNC's complaint stated as follows:

> "By this letter, we request the Federal Communications Commission to recognize that *personality*

* "J.A. ——" references are to the Joint Appendix in the Court of Appeals, a copy of which has been filed with the Clerk of this Court.

appearances by the man who holds the highest political office in this land are part of a campaign for reelection that our newspapers and politicians know has already begun. * * * This is a situation, pure and simple, where the President is selling the public *personality* of his private life to the American people. Much as we might wish that every American votes solely on the issues, we must recognize legally, as we recognize practically and psychologically, that millions of Americans vote on the basis of *personality* —and that the *personality* of the President on the 'Today' show was one of the opening guns in the selling of the President in 1972." (J.A. 6-7) (emphasis supplied)

The April 7, 1971 Indochina Speech

On April 7, 1971, the President appeared on the major television networks (NBC, CBS and ABC) to address the nation on the war in Indochina. The President, among other things, claimed success for his Vietnamization program and the military incursions into Cambodia and Laos. He also stated his reasons for opposing a firm date for the withdrawal of American forces from Vietnam.

On April 8, 1971, DNC sent a telegram to NBC requesting free prime time to respond to the President's address on the Indochina war. (J.A. 11) By telegram dated April 12, 1971 NBC denied DNC's request. (J.A. 12) Recognizing its obligation to present contrasting viewpoints on the Indochina war, NBC stated:

"NBC believes that balanced presentation of contrasting views on the Indochina war can best be achieved through NBC news, discussion, and interview programs. This is in accord with FCC fairness doctrine under which broadcasters are called upon to make determination of formats, programs and spokesmen for presentation of contrasting views on controversial public issues." (NBC Telegram, April 12, 1971)

NBC added that it planned to broadcast a special "Loyal Opposition" program during prime evening time on April 30, 1971, and that a number of Democratic spokesmen would be afforded an opportunity to express their respective views on the President's Indochina address at that time.* (NBC Telegram, April 12, 1971)

On April 13, 1971, DNC filed a complaint with the FCC demanding equal time on the NBC network to respond to the President's Indochina address. (J.A. 11-20) DNC did not contend that NBC had failed to present contrasting views on the Indochina war. (J.A. 18) Indeed, DNC admitted that NBC's news programming following the President's Indochina address "contained balanced analyses by those who share the President's views as well as those who oppose them." (J.A. 18) Instead DNC contended that the Democratic Party had not been given an adequate opportunity "to state and defend, in an *unfettered* manner, its views in conflict with those of the President." (J.A. 18) (emphasis supplied)

The FCC's Memorandum Opinion and Order

On August 20, 1971, the FCC denied DNC's request for time to respond to the NBC interview of the President on the "Today" program and the ABC interview of the President by Howard K. Smith. (Pet., p. 45a) The FCC also denied DNC's request for time to respond on NBC and CBS to the President's Indochina address. (Pet., p. 45a)

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* On April 30, 1971, NBC did broadcast its "Loyal Opposition" program. (J.A. 50) The participants included six Democratic Senators who, at the time, were considered likely to run for President in 1972. (J.A. 50) Each was asked, among other things, to comment on President Nixon's decision not to set a definite date for total withdrawal from Vietnam. The same six Democratic Senators had appeared one week earlier on an ABC television program entitled "Indochina—Another View." No fairness complaint was filed against ABC, presumably because ABC gave DNC the opportunity to choose "appropriate" Democratic spokesmen, while NBC did not.

Citing its rulings in *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970), and *Republican National Committee*, 25 F.C.C. 2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971), the FCC stated that the opposition party was not automatically entitled to time to respond to the President except where the President makes an appearance in the "political party" sense or where the President is a candidate for reelection. (Pet., pp. 50a-51a) All other Presidential appearances, the FCC stated, are subject only to general fairness requirements with respect to controversial issues covered:

> "Presidents and other public officials (*e.g.*, Governors, mayors) do report to the public, and such reports, as we have said, contribute to an informed citizenry. Of course, the officials in such reports are most often engaged in setting forth the wisdom of the particular actions on which the reports are given. But this does not mean that this is a political party appearance to which given equal opportunities 'is applicable.' If that were so, the Commission would have, in effect, amended the Communications Act to specify that equal opportunities applies to all appearance[s] of public officials. The Act, we believe, makes clear that it is fairness—not equal opportunities—which should govern here; and in any event, we believe it sound policy, for the reasons set forth in [*Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970)] that this situation—appearances of public officials during non-election periods—should come under the fairness doctrine with respect to controversial issues covered." (Pet., p. 51a)

With respect to Presidential appearances such as the "Today" interview, the FCC stated:

> "The question * * * is whether on an overall basis the networks have afforded reasonable opportunity for the discussion of contrasting viewpoints on these

> varied issues. And in view of the overall programming of the three networks, it cannot be said that the 'sum total' of any of the networks' efforts failed to satisfy the requirements of the fairness doctrine." (Pet., pp. 53a-54a)

The FCC further stated that "in terms of prime time coverage of the Indochina war, there is no evidence that any of the networks has failed to afford reasonable opportunities for the presentation of contrasting views." (Pet., p. 54a)

The Court of Appeals' Opinion

The Court of Appeals unanimously affirmed the FCC's Memorandum Opinion and Order. (Pet., p. 1a) Rejecting DNC's claim that the fairness doctrine required an automatic right of reply to Presidential appearances, the Court of Appeals stated, "We cannot stress too strongly that this doctrine nowhere requires equality but only reasonableness." (Pet., p. 25a) Explaining that the fairness doctrine does not operate with the same mathematical precision as does the "equal opportunities" requirement of Section 315, the Court of Appeals stated:

> "By its very nature the fairness doctrine is one which cannot be applied with scientific and mathematic certainty. There is no formula which if followed will assure that the requirements of the doctrine have been met. Procedurally, the doctrine can only succeed when the licensee exercises that discretion upon which he is instructed to call upon in dealing with the coverage of controversial issues." (Pet., p. 17a)

The Court of Appeals added that it had "clearly stated time after time, *ad infinitum ad nauseam*, that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee." (Pet., p. 22a)

Responding to DNC's argument that the opposition party would always be the "appropriate" spokesman to respond to the President, regardless of the particular issue he discussed, the Court of Appeals stated:

> "Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. * * * At times the President speaks to crucial problems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. *This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States.*" (Pet., p. 36a) (emphasis supplied)

In rejecting DNC's claim for time to respond to the President's Indochina address and the ABC interview of the President by Howard K. Smith, the Court of Appeals held that while the fairness doctrine was applicable to Presidential appearances involving the discussion of controversial issues, DNC had failed to show a lack of balanced coverage on any of the issues discussed by the President. (Pet., pp. 27a-28a) The Court of Appeals noted that there was considerable room for licensee discretion in the presentation of contrasting viewpoints (Pet., p. 28a), and admonished that "[i]t is not * * * for the Commission or this court to encroach upon the discretion of the licensee in absence of an apparent abuse of this discretion." (Pet., p. 28a) With respect to the NBC interview of the President on the "Today" program, the Court of Appeals held that DNC was not entitled to "a right of reply to this type of personal interview of a non-candidate." (Pet., p. 27a)

Answering DNC's claim that the FCC's burden of proof requirement was unreasonable, the Court of Appeals held that the claim was barred by DNC's failure to raise the claim before the FCC (Pet., pp. 37a-38a), and that in any event, there was nothing unreasonable in placing the initial burden on the complainant in fairness doctrine cases. (Pet., p. 38a) The Court of Appeals also held that DNC's request for an evidentiary hearing was properly denied. (Pet., pp. 39a-40a) Finally, the Court of Appeals held that the Republican National Committee (hereinafter "RNC")—which had sought review of a different portion of the FCC's Memorandum Opinion and Order—had not made a sufficiently detailed showing to require the production of ABC's logs and other programming documents. (Pet., pp. 29a-33a)

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FAIRNESS DOCTRINE DOES NOT REQUIRE THAT A LICENSEE MAKE EQUAL TIME AVAILABLE TO THE OPPOSITION PARTY EVERY TIME THE PRESIDENT APPEARS ON TELEVISION.

DNC's claim that the opposition party is entitled to equal time to respond to television appearances by the President finds no support in either the fairness doctrine—as interpreted by the FCC and this Court—or the First Amendment. In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969), this Court held that the FCC's interpretation of the fairness doctrine is entitled to "great weight" and should be followed unless there are "compelling" indications that it is wrong. Here, the FCC, relying on 20 years of administrative experience and referring to the policy considerations set forth in its rulings in *Committee for the Fair Broadcasting of Controversial Issues*, *supra*, and *Republican National*

Committee, supra, has determined that the public interest would best be served by applying traditional fairness standards to Presidential appearances in non-election periods. Stripped of its shrill First Amendment rhetoric, DNC's only point is that the "equal opportunities" approach urged by DNC here and in two pending rule-making proceedings* would better serve the public interest. Where, as here, the FCC's determination is supported by reasons which are surely rational, there is simply no warrant for further review by this Court. As Mr. Justice Frankfurter stated in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 224 (1943):

> "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the * * * [r]egulations. The responsibility belongs to Congress for the grant of valid legislative authority and to the Commission for its exercise."

See also *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956) ("Courts are slow to interfere with [FCC's] conclusions when reconcilable with statutory directions."); *Neckritz* v. *FCC,* 446 F.2d 501, 502 (9th Cir. 1971) ("[A] court's role is limited to deciding whether the Commission's order is reasonable or in contravention of statutory purpose."); *Greater Boston Television Corp.* v. *FCC,* 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971) ("Assuming consistency with law and the legislative mandate, the agency has latitude not merely to find facts and make judgments,

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* See *Fairness Doctrine and Public Interest Standards: Notice of Inquiry Regarding Handling of Public Issues, Part V,* Docket No. 19260, FCC 71-623, 36 Fed. Reg. 11825 (1971); *Obligations of Broadcast Licensees Under the Fairness Doctrine: Notice of Proposed Rule Making,* Docket No. 18859, FCC 70-507, 35 Fed. Reg. 8720, 8834 (1970).

but also to select the policies deemed in the public interest.")

Clearly the FCC cannot be said to have acted arbitrarily in refusing to create an automatic right of reply to Presidential television appearances. The rationality of the FCC's action can be defended on the ground that Congress early considered and rejected the notion of equal opportunities for controversial issues (67 Cong. Rec. 12502-12504). Its rationality can be defended on the ground that the fairness doctrine is issue-oriented. See *Red Lion Broadcasting Co.* v. *FCC*, *supra*; *Green* v. *FCC*, 447 F.2d 323, 328 (D.C. Cir. 1971); see also Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting*, 34 Law & Contemp. Prob. 278, 297 (1969). Its rationality can be defended on the ground that the Democratic Party will not always be the "appropriate" spokesman to respond to a Republican President on a particular controversial issue. Its rationality can be defended on the ground that no particular individual or group has the right to present the contrasting viewpoint, absent a personal attack or actual candidacy. See *Green* v. *FCC*, *supra*. As the FCC stated in *Boalt Hall Student Association*, 20 F.C.C. 2d 612, 615 (1969):

> "[T]he cornerstone of the fairness doctrine is not the right of any particular individual or group to speak but rather the public's right to be informed as to all significant points of view relating to an issue of public importance."

DNC's suggestion that its petition for certiorari should be granted because this Court recently agreed to review "related First Amendment issues" (Pet., p. 12) in *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted sub nom. Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, Nos. 71-863, *et al.*, 40 U.S.L.W. 3410 (February 29, 1972) is ill-founded. In *BEM*, as the complainants

conceded, all of the requirements of the fairness doctrine had been fully complied with by the broadcast licensees involved. Given that fact, the central issue raised in *BEM* was whether the First Amendment compelled licensees who had complied with the fairness doctrine to sell advertising time to individuals or groups for brief "spot" announcements asserting their particular views. *BEM* did not involve any claim that the "equal opportunities" requirement of Section 315 should be extended to Presidential appearances in non-election periods. Nor did *BEM* involve any request for *free* television time. Moreover, in *BEM*, the Court of Appeals' decision was in square conflict with the decisions of the First and Third Circuits in *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950) and *McIntire* v. *Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597 (3d Cir. 1945), *cert denied*, 327 U.S. 779 (1946). Here, as DNC recognizes, there is no such conflict.

In terms of basic fairness doctrine principles, the Court of Appeals' affirmance of the FCC's ruling in this case was quite unexceptionable. Unlike the "equal opportunities" requirement of Section 315, which requires absolute equality in the use of broadcast facilities by rival candidates, the fairness doctrine requires only that the licensee afford "reasonable opportunity" for the presentation of contrasting viewpoints. In *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 599 (1964), the FCC explained the distinction as follows:

> "While Section 315 * * * embodies both the 'equal opportunities' requirement and the fairness doctrine, they apply to different situations and in different ways. The 'equal opportunities' requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions * * *, the law provides that if a licensee permits a person

who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station.

* * *

"The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the 'equal opportunities' requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of the situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to format and spokesmen to present the viewpoints, and all the other facets of such programming. * * * There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'equal opportunities' requirement."

See also *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 291-92 (1970).

In ignoring this distinction—a distinction recognized by this Court in *Red Lion*, *supra*, 395 U.S. at 369—DNC's claim distorts both the fairness doctrine and the "equal opportunities" requirement of Section 315. It distorts the fairness doctrine by putting the primary focus on the identity of the speaker rather than the issues he discusses. It distorts the "equal opportunities" requirement of Section 315 by imposing on the broadcast licensee an obligation to provide "equal time" for non-candidates engaged in non-campaigns during non-election periods.

As the Court of Appeals noted, DNC's claim that the fairness doctrine requires an automatic right to reply

to Presidential "personality appearances" such as the "Today" interview is frivolous. The fairness doctrine is concerned with issues, not personalities, and if no issues are discussed, plainly the doctrine does not apply. The inapplicability of the fairness doctrine to "this type of personal interview of a non-candidate" (Pet., p. 27a) should be obvious from the nature of the questions that were asked:

> "MISS WALTERS: Mr. President, I have read that you proposed to Mrs. Nixon the very first time that you met and that Mrs. Nixon turned you down at that time. What I want to ask you is how you think your life would have been different if she had not finally said yes. What has Mrs. Nixon herself contributed to your life?
>
> * * *
>
> "MISS WALTERS: I want to go back to what we were talking about in the very beginning, and that is the proposal on the first night that you met. That is a very impulsive thing to do, Mr. President, and you are not generally thought of as an impulsive man. Do you remember that evening and your mood?
>
> * * *
>
> "MISS WALTERS: And while we are talking of marriages, Mr. President, how can I not ask you for some comment on what has been in the news every day, and that is perhaps the impending engagement for your daughter, Tricia?
>
> * * *
>
> "MISS WALTERS: * * * I want to talk a little bit about Washington wives, Washington political wives. They seem to fall in general into two categories, those who support their husbands' views, and remain rather silent about issues, and those who independently speak out on issues; those rare ones who do. What is your view of the politicians' wives'

role? Notice how I mention no names, Mr. President." *

Contrary to DNC's suggestion (Pet., pp. 13-15), neither the First Amendment nor the fairness doctrine requires that the "opposition party" receive exactly the same amount of television coverage as does the President. Such an approach would only serve to discourage licensees from broadcasting Presidential addresses and interviews. As the FCC stated in *Committee for Fair Broadcasting, supra:*

> "We do not believe that any extended discussion is needed as to why the licensee is afforded so much discretion under the fairness doctrine. In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts; interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting 'fourth estate,' overseeing thousands of complaints that some issue had not been given 'equal treatment.' We do not believe that the profound national commitment to the principle that debate on public issues should be 'uninhibited, robust, wide-open' (*New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental inter-

* The transcript of the "Today" program was reprinted in full in Appendix A of NBC's Brief in the Court of Appeals.

vention to insure such mathematical equality." 25 F.C.C.2d at 292.

Surely the *Committee for Fair Broadcasting* approach—which was followed here by the FCC and approved by the Court of Appeals—is consistent with "the First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 392. DNC's contention that a different approach might better serve the end of fairness (Pet., pp. 16-19) does not raise any issues warranting review by this Court.

II. THE COURT OF APPEALS CORRECTLY HELD THAT DNC WAS NOT ENTITLED TO RAISE ITS BURDEN OF PROOF CLAIM FOR THE FIRST TIME ON APPEAL.

DNC also urges that review is required because the Court of Appeals' decision approved two "procedural barriers" which—according to DNC—deny fairness doctrine complainants "any semblance of procedural fairness." * (Pet., p. 19) In particular, DNC claims that the FCC has improperly allocated the burden of proof in fairness doctrine cases by placing the burden on the complainant rather than the licensee. (Pet., p. 19) DNC also claims that the FCC erred in refusing the Republican National Committee's request for ABC's logs and other programming documents. (Pet., p. 20) Neither claim warrants consideration by this Court.

DNC's burden of proof claim was raised for the first time in the Court of Appeals. (Pet., pp. 38a-39a) The claim was never raised before the FCC (Pet., p. 38a) and is therefore barred by Section 405 of the Communi-

* DNC does not now dispute the correctness of the Court of Appeals' holding that no evidentiary hearing was required to determine whether the networks had fulfilled their fairness obligations with respect to the Indochina war. (Pet., pp. 38a-40a)

cations Act. See 47 U.S.C. § 405; *Green* v. *FCC*, *supra*, 447 F.2d at 329; *Presque Isle TV Co., Inc.* v. *United States*, 387 F.2d 502 (1st Cir. 1967); *Florida Gulfcoast Broadcasters, Inc.* v. *FCC*, 352 F.2d 726 (D.C. Cir. 1965). In any event, there is nothing unreasonable in placing the burden on the party alleging a violation of the fairness doctrine. As the FCC stated in *Letter to Allen C. Phelps*, 21 F.C.C.2d 12, 13 (1969):

> "Absent detailed and specific evidence of failure to comply with the requirements of the fairness doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time."

See also *Hale* v. *FCC*, 425 F.2d 556, 558-59 (D.C. Cir. 1970).

DNC's claim that the FCC erred in refusing to compel the production of ABC's program logs is essentially a variation on the burden of proof theme. It does not merit review for the simple reason that ABC's logs were requested by RNC, not DNC. (Pet., p. 29a) In any event, the Court of Appeals' holding that ABC was not required to produce its logs was clearly correct. See *Letter to Robert G. Ryan*, 25 F.C.C.2d 884, 885 (1970).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LAWRENCE J. MCKAY
DONALD J. MULVIHILL
FLOYD ABRAMS
LAURENCE T. SORKIN
CAHILL, GORDON, SONNETT,
REINDEL & OHL
1819 H Street, N.W.
Washington, D.C. 20006

Attorneys for Intervenor
National Broadcasting
Company, Inc.

Of Counsel:

CORYDON B. DUNHAM
Vice President and
General Counsel
NATIONAL BROADCASTING
COMPANY, INC.
30 Rockefeller Plaza
New York, N. Y. 10020

HOWARD MONDERER
Washington Attorney
NATIONAL BROADCASTING
COMPANY, INC.
1800 K Street, N.W.

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OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC. IN OPPOSITION

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
STEPHEN A. WEISWASSER
WILMER, CUTLER & PICKERING
900 - 17th Street, N.W.
Washington, D. C. 20006

Counsel for Respondent Columbia Broadcasting System, Inc.

Of Counsel:
ROBERT V. EVANS
RALPH E. GOLDBERG
JOSEPH DEFRANCO
ELEANOR S. APPLEWHAITE
51 West 52 Street
New York, New York 10019

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR COLUMBIA BROADCASTING SYSTEM, INC. IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion has not yet been officially reported. It appears as Appendix A to the Petition. (App. 1a-41a.)* The opinion and order of the Federal Communications Commission is officially reported at 31 F.C.C. 2d 708 (1971). It appears as Appendix C to the Petition. (App. 43a-55a.)

JURISDICTION

The court of appeals' judgment was entered on February 2, 1972. The petition for a writ of certiorari was

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* "App. —" citations are to the Appendix to the Petition for Writ of Certiorari.

filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed a ruling of the Federal Communications Commission declining to require licensees automatically to afford Petitioner time to respond to broadcast appearances of the President of the United States.

2. Whether Petitioner adequately raised below its allegations regarding the validity of the Federal Communications Commission's procedures for processing fairness doctrine complaints, and, if so, whether the court of appeals erred in upholding the reasonableness of those procedures.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

STATEMENT OF FACTS

This case arises from the continuing efforts of Petitioner Democratic National Committee ("DNC") to obtain an automatic right to time to respond to broadcast appearances of the President of the United States. Petitioner is also pressing its contention before the Federal Communications Commission (the "Commission") in two pending rulemaking proceedings.[1]

In this case, DNC seeks a right to reply to three television appearances of the President in March and April

[1] DNC has filed comments urging the Commission to adopt such a rule in *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, Docket No. 19260, 30 F.C.C.2d 26 (1971), and in *Obligations of Broadcast Licensees Under the Fairness Doctrine: Notice of Proposed Rule Making*, Docket No. 18859, 35 Fed. Reg. 7820 (1970).

1971. The first was a March 15, 1971 interview broadcast by the National Broadcasting Company, Inc. ("NBC") on the "Today Show"; the President was interviewed for approximately 48 minutes on a variety of topics, with the primary focus on his personal life. (App. 4a.) The second was on a one-hour program entitled "A Conversation With The President" broadcast by American Broadcasting Companies, Inc. ("ABC") on March 22, 1971; in the course of this broadcast an ABC newsman interviewed the President on a wide variety of issues, but primarily on the Administration's policies with respect to Southeast Asia. (App. 4a-5a.) The third appearance was a 20-minute Presidential address to the nation, on April 7, 1971, which was broadcast by the three major radio and television networks; the President discussed the Administration's programs and policies in Southeast Asia. (App. 5a.) This address was the only one of the President's appearances at issue which was broadcast by CBS. All of these broadcasts pre-dated the President's announcement that he would be a candidate for the Republican nomination in 1972.[2]

In a series of telegrams to the networks, DNC sought equal time to reply to each of the appearances. In response to DNC's request to respond to the President's April 7 speech, ABC determined that, on the basis of the network's overall coverage, it would be appropriate for it to give DNC one-half hour to discuss the war issue. Each of the networks denied DNC's request for time to reply to the other Presidential appearances.[3]

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[2] The President announced his candidacy on January 7, 1972. See *New York Times*, January 8, 1972, p. 1.

[3] App. 5a-6a. The Republican National Committee ("RNC") sought an opportunity to respond to DNC's half-hour broadcast on ABC. (App. 7a-11a.) Finding that ABC had complied with the fairness doctrine, the Commission denied RNC the relief requested. (App. 54a.) The court below affirmed. (App. 28a-33a.) RNC has not sought review in this Court.

DNC thereupon filed letters of complaint with the Commission against all three networks. (J. App. 1-41.) [4] DNC urged the Commission to expand the fairness doctrine—which generally requires that broadcasters present conflicting views on controversial issues of public importance—to afford Petitioner an automatic right to respond to Presidential broadcast appearances. DNC made no effort to establish that any of the networks had failed to comply with their traditional fairness doctrine obligations.

In response to the DNC complaint, CBS pointed out (J. App. 65-73; 126-29) that neither the fairness doctrine nor the Commission's decisions afforded DNC an automatic right to respond to the President. CBS also summarized the extensive coverage it had given to the views of those opposed to the Administration's Vietnam policies. (J. App. 68-70.) The summary demonstrated that Democratic Party leaders had been afforded significant opportunities to present views opposing those of the President.[5] CBS also pointed out that it had scheduled an appearance of the Chairman of DNC on FACE THE NATION the following week. (J. App. 70n.**.) ABC and NBC also stated that they had broadcast and would continue to broadcast contrasting views on the issues discussed in the Presidential appearances. (J. App. 46-50; 52-59.)

In its reply, while still making no effort to establish that the networks had failed to comply with the general fairness doctrine, DNC sought a formal evidentiary hear-

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[4] "J. App. ——" citations are to the joint appendix in the court of appeals, a copy of which has been filed with the Clerk of this Court.

[5] In addition, it should be noted that CBS has periodically provided time free of charge to Democratic Party spokesmen to discuss issues selected by them. See *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. D.C. ——, 454 F.2d 1018 (1971).

ing to test the networks' fairness doctrine compliance. (J. App. 111-20.)

The Commission denied DNC's complaints. It held that the question, under long-standing fairness doctrine principles, was "whether on an overall basis the networks have afforded reasonable opportunity for the discussion of contrasting viewpoints." The Commission concluded that DNC had made no showing that any of the networks had failed to do so.[6] It declined to extend the fairness doctrine to afford DNC an automatic right to respond to the President, but noted that the general issues DNC sought to raise would be considered in the Commission's pending rulemaking proceeding.[7]

The court of appeals unanimously affirmed. It concluded that the Commission was not compelled by the First Amendment or the Communications Act to require broadcasters to afford Petitioner an automatic right of reply to Presidential broadcast appearances, and that the Commission's ruling was fully consistent with its prior holdings. (App. 14a-28a; 35a-37a.) Noting that, on review, DNC was asserting that the Commission improperly required it to make a *prima facie* showing of a fairness doctrine violation, the court pointed out that this issue had not been raised before the Commission and that DNC was therefore barred from raising it on review. Nevertheless, the court reaffirmed earlier decisions holding that the Commission's procedures were reasonable. (App. 37a-38a.) Finally, the court rejected DNC's claim of a right to an evidentiary hearing to test whether the networks had satisfied the requirements of the fairness doctrine. It found no statutory basis for such

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[6] App. 53a-54a. The Commission also denied DNC's request for an evidentiary hearing, because there was "no basis for further action on the specific programs involved." App. 54a.

[7] App. 54a-55a. Commissioner Johnson dissented without opinion.

a requirement and held that it would cause undue delay in the resolution of complaints. It concluded that existing Commission procedures, which had been employed in the *Red Lion* case,[8] were clearly reasonable and in the public interest. (App. 38a-40a.)

ARGUMENT

This case reflects DNC's continuing attempt to obtain substantial modification of long-standing fairness doctrine principles approved by Congress and consistently applied by the Commission, so as to obtain an automatic personal right to broadcast time to respond to Presidential appearances. DNC does not assert that the decision below conflicts with any decision of this Court or with any decision of any other circuit. Nor does it argue that the Commission has incorrectly applied the traditional principles of the Communications Act to this case. DNC's basic contention appears to be that its own proposals would better achieve the goals of the First Amendment and the Communications Act than those consistently followed up to the present time. The Commission and the court below properly rejected Petitioner's contention, and review by this Court is neither necessary nor appropriate.

1. Although it fails to identify any of the traditional tests for grant of certiorari, DNC does assert (Pet. 12) that certiorari should be granted because the Court will be reviewing, in the coming Term, the decision of the court of appeals in *Business Executives' Move for Vietnam Peace* v. *FCC*, —— U.S. App. D.C. ——, 450 F.2d 642 (1971), *cert. granted sub nom. Columbia Broadcasting System, Inc.* v. *Democratic National Committee*,

[8] *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

405 U.S. 953 (1972) (Nos. 71-863—71-866) ("*BEM*").[9] DNC suggests (Pet. 12) that the Court's "examination of the First Amendment obligations imposed on broadcasters" in that case will "be aided" by concurrent consideration of this case. DNC concedes, however, that the issues in the two cases are "not identical." *Ibid.*

In fact, the *BEM* case is in no way similar to this case. As the court of appeals in *BEM* characterized it, that case concerns time for paid "spot" announcements and involves "the public's First Amendment interests in broadcasters' allocation of advertising time."[10] The court there held that a licensee that sells advertising time to commercial advertisers cannot refuse to sell time for short spot announcements on controversial issues of public importance. As for requests to purchase program time, the court stated that the "constellation of constitutional interests would be substantially different."[11]

At any rate, the *BEM* case did not involve requests for free time to discuss controversial issues of public importance. The panels in the *BEM* case and in this case both recognized that in that area the governing standard is fixed by the equal opportunities provisions of Section 315 of the Communications Act, 47 U.S.C. § 315, and the Commission's fairness doctrine. 450 F.2d at 654; App. 22a.

2. Petitioner does not and cannot contend that its claimed automatic right to respond to the President is required by the equal opportunities provisions of Section

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[9] While Petitioner (Pet. 11) characterizes these as "several cases," they are in fact several petitions for certiorari involving review of the same decision.

[10] 450 F.2d at 654. "Spot announcements" are the short time segments, typically one minute or less, sold by broadcasters to advertisers.

[11] *Ibid.* "Program time" is the time broadcasters generally devote to more lengthy presentations of entertainment, news, public affairs and other non-commercial material.

315 of the Communications Act. President Nixon was not an announced candidate for re-election at the time of the appearances in question.[12] Indeed, as the Commission recognized in this case, Petitioner is in effect requesting that the Commission undertake to amend Section 315 by extending an automatic "equal opportunities" right of reply to appearances of the President. That result would be utterly inconsistent with the Congressional scheme, in which Section 315 has been deliberately limited to certain election appearances of candidates for public office. (App. 51a.)

Nor does Petitioner contend that the decision below is inconsistent with the Commission's traditional interpretation of the fairness doctrine. In the court below DNC conceded that it would not be entitled to an automatic right of reply to Presidential appearances under the fairness doctrine, as sustained by this Court in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).[13] That is because the fairness doctrine requires only that opposing views be presented. It does not require that they be afforded "equal time" or that they be presented by particular spokesmen such as DNC.[14] Accordingly, while the Commission has ruled that the fairness doctrine applies

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[12] See *McCarthy* v. *FCC*, 129 U.S. App. D.C. 56, 390 F.2d 471 (1968). See also note 2, *supra*. If the President had been an announced candidate for the Republican nomination, and if he had appeared in a broadcast not exempt from the equal opportunities requirements of Section 315, the networks would have been required to afford equal opportunities only to opposing candidates for the Republican nomination. See, *e.g.*, *Kay* v. *FCC*, 143 U.S. App. D.C. 223, 443 F.2d 638 (1970).

[13] DNC Br. 19, 21-22.

[14] One of the general fairness doctrine's most basic precepts, stated in the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), is that no specific individual or group has the right to present opposing views, and that "the licensee must operate on a basis of overall fairness." 13 F.C.C. at 1250.

to Presidential statements on controversial issues, it has consistently required only that licensees provide a reasonable opportunity for the presentation of views contrasting with those of the President.[15]

3. Petitioner contends that the principles of the Commission's traditional fairness doctrine, while adequate as "abstract propositions" (Pet. 16), are constitutionally inadequate as applied to Presidential appearances. The Commission and the court of appeals properly rejected this contention.

The record before the Commission afforded no basis for concluding that the application of fairness doctrine principles to Presidential appearances has failed to produce fair presentation of views on controversial issues contrasting with those of the Administration. While the record shows that broadcasters, like other media, exhibit considerable interest in the President's activities—as an individual, national leader, and Administration spokesman—it flatly contradicts DNC's assertion (Pet. 13, 15) that, under the present system, "those opposing the President's views [are denied] any effective right to respond" and that "only the President's voice and views will be heard clearly on critical issues." See pp. 5-6, *supra*.[16]

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[15] See, *e.g.*, *Committee for Fair Broadcasting of Controversial Issues*, 25 F.C.C.2d 283, 294-96 (1970); *Letter to Blair Clark*, 11 F.C.C.2d 511, 515, *aff'd sub nom. McCarthy* v. *FCC*, 129 U.S. App. D.C. 56, 390 F.2d 471 (1968); *Letter to Republican National Committee*, 40 F.C.C. 625, 627 (1964). See also App. 50a, 53a-54a.

In one *sui generis* situation, *Committee for Fair Broadcasting*, *supra*, 25 F.C.C.2d at 297, the Commission has required broadcasters to afford an opportunity for the uninterrupted presentation of opposing views in answer to the President.

[16] It is particularly surprising that DNC focuses in this case on the supposed Presidential monopoly of opinion on the Indochina War issue. As the District of Columbia Circuit recently concluded in another case, it is hard to imagine "that any live American has

Moreover, DNC cannot appropriately claim that it should be afforded special rights to appear as the spokesman for those who disagree with the President's views. In broadcasting, characterized by a limited number of available frequencies, not all those wishing to present their particular views may be afforded time and in general no one individual or group can claim an automatic right to present contrasting views.[17] As the court below stated (App. 36a):

> "[DNC asserts] . . . that as the leading party out of the White House and as the majority party in Congress . . . [it] would always be an appropriate party to respond. DNC feels it is obligated to inform the nation of the viable options open to it. Should this be DNC's manifest destiny we can find no reason to compel the networks to assist it. Can it be said that others are not equally capable of the task? At times the President speaks to crucial prob-

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been left uninformed about the desirability or undesirability of military service, the draft, or the Vietnam War," and "these issues have been ventilated *in extenso* for years on (probably) every television and radio station in the land." *Green* v. *FCC*, 144 U.S. App. D.C. 353, 359, 360, 447 F.2d 323, 329, 330 (1971).

Moreover, as the court of appeals in this case stated (App. 36a-37a):

> "Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking. We see no need for supplementation based on some theoretical right in the First Amendment which at best has gone undefined in this litigation."

[17] See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

lems to which other groups are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States."

4. Petitioner also asserts that the Commission's refusal to extend the fairness doctrine by according it an automatic right of reply is arbitrary and capricious because the Commission has adopted automatic right of reply requirements in the personal attack and political editorial rules, sustained by this Court in the *Red Lion* case, and in the so-called political party doctrine.[18] DNC does

[18] The personal attack rules require a licensee under certain circumstances to afford reply time to an identifiable person or group whenever, during the course of discussion of a controversial issue of public importance, the person or group has been the object of an attack dealing with "honesty, character, integrity, or like personal qualities." The political editorial rules require a licensee to afford time to a candidate for public office or his spokesman when the licensee has editorially endorsed opponents of a candidate or opposed him. See, *e.g.*, Section 73.679 of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 73.679.

The so-called political party doctrine was announced in two Commission decisions, *Letter to Nicholas Zapple*, 23 F.C.C.2d 707, (1970), and *Republican National Committee*, 25 F.C.C.2d 739 (1970), *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, —— U.S. App. ——, 454 F.2d 1018 (1971). In *Zapple*, the Commission held that, when a broadcaster sells time to supporters of a candidate during an election period, it must sell comparable time to supporters of opposing candidates. In *Republican National Committee*, the Commission held that CBS was required to afford time to the Republican National Committee because it had afforded time to the Chairman of the Democratic National Committee to respond to a Presidential broadcast appearance. It is particularly ironic that DNC relies in this case upon the Commission's *Republican National Committee* ruling, since DNC, along with CBS, successfully challenged that decision on appeal. The court of appeals

not suggest, however, why the Commission's actions in adopting these fairness doctrine "corollaries" are inconsistent with its ruling in this case.[19] In any event, great weight should be accorded to the Commission's interpretation of its responsibilities in this area under the Communications Act and its judgment as to the proper policy for achieving the Act's objectives.[20] The Commission is not required by the Act to afford such reply opportunities in each and every situation, especially in the absence of any evidence that the traditional principles of the fairness doctrine are not adequate to ensure the presentation of contrasting views.

5. Before the Commission and the court of appeals, Petitioner contended that it was entitled to a formal evidentiary hearing to determine whether the networks had complied with the fairness doctrine in their handling of the Presidential appearances in question. The contention was rejected both by the Commission and the court below, and Petitioner does not urge this Court to review those rulings. Instead, Petitioner contends that the Com-

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reversed the Commission on the grounds that its decision was in direct conflict with an earlier Commission ruling and that it was otherwise arbitrary and irrational.

[19] Before the court of appeals, DNC argued that the Commission adopted these "corollaries" because of the "impact" of the original appearances. As was pointed out below, these rules have nothing to do with "impact." The personal attack rules and the political editorial rules trigger a right to respond regardless of the "impact" of the personal attack or of the political editorial. See *Red Lion*, *supra*, 395 U.S. at 378-79. The third "corollary"—the so-called "political party" doctrine—is equally unrelated to notions of "impact," either in its applications or in its origins. Under the *Zapple* ruling, *supra*, the right to purchase time is triggered merely by the first party's purchase regardless of the "impact" of its broadcast. Even under the Commission's now-reversed *Republican National Committee* ruling, *supra*, the "impact" of the political party's appearance was irrelevant.

[20] See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-82.

mission erroneously placed the burden on Petitioner to make a *prima facie* showing that the networks had violated the fairness doctrine and improperly refused to require the networks to provide documentation concerning their coverage of the issues discussed in the Presidential broadcasts. Neither of these contentions was properly raised by Petitioner before the Commission, and accordingly cannot properly constitute a ground for reversal.

The court of appeals specifically found (App. 37a-38a) that Petitioner had "failed to preserve" the burden of proof issue for review.[21] As to the second contention, concerning documentation, Petitioner made no request for documentation from the networks, did not raise the issue before the Commission, and barely adverted to it before the court of appeals.[22] Petitioner seeks to rest, however, on the fact that before the Commission the Republican National Committee ("RNC") sought documentation from ABC concerning its complaint that that network had violated the fairness doctrine by unduly favoring anti-Administration views. (Pet. 20n. 29.) Obviously, RNC's request for documentation is not sufficient to bring before this Court a contention which DNC failed to assert before the Commission.[23] In any event, the Commission's procedures for handling fairness doctrine

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[21] See Section 405 of the Communications Act of 1934, as amended , 47 U.S.C. § 405, which precludes judicial review where, as here, the petitioner fails to seek reconsideration of the Commission's action, and seeks to rely "on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass."

[22] DNC Br. 38-40.

[23] RNC sought documentary support solely from ABC and solely to demonstrate that, if that network's non-news programs (such as the "Dick Cavett Show") were taken into account, ABC had broadcast excessive amounts of anti-Administration views.

complaints in these respects are fully consistent with its past practice,[24] and have previously been sustained by the District of Columbia Circuit as reasonable.[25]

6. Finally, even if there were issues here meriting review by this Court—which we submit there are not—this case is not an appropriate vehicle for considering them. In current rulemaking proceedings the Commission has before it Petitioner's request that it be afforded an automatic right of reply to Presidential appearances. See note 1, *supra*. The Commission also has before it the very questions Petitioner seeks to raise regarding its procedures for processing fairness doctrine complaints.[26] If issues in this area are to be considered by this Court, they can and should be reviewed in the context of the Commission's action in those rulemaking proceedings and the record made therein.[27]

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[24] See, *e.g.*, *Robert G. Ryan*, 25 F.C.C.2d 884 (1970); *Allen C. Phelps*, 21 F.C.C.2d 12 (1969); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance* (the *"Fairness Primer"*), 40 F.C.C. 598, 600 (1964).

[25] See, *e.g.*, *Hale* v. *FCC*, 138 U.S. App. D.C. 125, 127-28, 425 F.2d 556, 558-59 (1970). As the court below noted (App. 30a), quoting from the Commission's *Fairness Primer:*

> "'[I]t would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time.'"

[26] See, *e.g.*, Comments of the Office of Communication of the United Church of Christ, *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act: Notice of Inquiry*, Docket No. 19260, December 20, 1971.

[27] In the light of pending rulemaking proceedings, the Commission could reasonably refuse to consider Petitioner's proposals for

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LLOYD N. CUTLER
J. ROGER WOLLENBERG
TIMOTHY B. DYK
STEPHEN A. WEISWASSER
WILMER, CUTLER & PICKERING
900 - 17th Street, N.W.
Washington, D. C. 20006

Counsel for Respondent Columbia Broadcasting System, Inc.

Of Counsel:

ROBERT V. EVANS
RALPH E. GOLDBERG
JOSEPH DEFRANCO
ELEANOR S. APPLEWHAITE
51 West 52 Street
New York, New York 10019

June 20, 1972

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radical and far-reaching changes in an *ad hoc* request for declaratory ruling. See, *e.g.*, *Martin-Trigona* v. *FCC*, 139 U.S. App. D.C. 249, 432 F.2d 682 (1970); *Hale* v. *FCC*, *supra*.